Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

CHARLES THOMAS JACKSON,

Petitioner,

v.

JOHN E. POTTER Postmaster General, United States Postal Service;

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does the District Court have jurisdiction under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, to review decisions of the U.S. Equal Employment Opportunity Commission in Federal Sector EEO complaints?

2. Does a federal agency's failure to acknowledge amendments to an EEO complaint and refusal to produce records relevant to material issues justify summary judgment in favor of an EEO complainant?

3. Does evidence of involuntary servitude raise a question of fact sufficient to rebut an agency's otherwise nondiscriminatory explanation for its treatment of an African American male?

PARTIES

The party to this petition is Charles Thomas Jackson. The parties in the courts below were Charles Thomas Jackson; John E. Potter, Postmaster General, United States Postal Service; and the U.S. Equal Employment Opportunity Commission.

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PRIOR OPINIONS

The opinion of the Court of Appeals is unpublished (App. p. B-1). The Order Granting USPS's Motion for Summary Judgment is unpublished (App. p. D-1). The Order Granting EEOC's Motion to Dismiss is unpublished (App. p. E-1). The decision of the EEOC Office of Federal

Operations is published online at http://www.eeoc.gov/decisions/01980503.txt (App. F-1).

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on December 10, 2004, by the United States Circuit Court of Appeals for the Ninth Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1). This Petition is timely filed because it was mailed within ninety days of March 9, 2005, the date a motion for rehearing was denied in the court below. Rules 13.3 and 29.2. Jurisdictional basis for the Ninth Circuit is 28 U.S.C. 1291, and for the District Court is 28 U.S.C. 1331.

STATUTES INVOLVED

5 U.S.C. §704 in pertinent part provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review under the Administrative Procedure Act.

REGULATIONS INVOLVED

29 C.F.R. §1514.106(d) in pertinent part provides:

> A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

29 C.F.R. §1514.106(e) in pertinent part provides:

> The agency shall acknowledge receipt of a complaint or an amendment to a complaint in writing and inform the complainant of the date on which the complaint or amendment was filed.

29 C.F.R. §1614.108 (a) and (b) in pertinent part provide:

> (a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed. (b) In the course of its investigation, the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

29 C.F.R. §1614.108 (c)(3) in pertinent part provides:

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances: (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information; (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; [or] . . .(iv) Issue a decision fully or partially in favor of the opposing party.

29 C.F.R. §1614.109(f)(3) in pertinent part provides:

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances: (i)Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

> (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; [or] . . . (iv) Issue a decision fully or partially in favor of the opposing party.

Rule 1.7 of the ABA Model Rules of Professional Conduct:

> Prohibits representations that "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest," unless: (1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after consultation."

STATEMENT OF THE CASE
PROCEDURAL HISTORY

This case began with Petitioner's filing e Request for EEO Counseling, on May 18, 1994, with the Postal Service office of EEO Compliance and Appeals. Petition-er complained of a pattern of disparately punitive per-sonnel actions, apparently intended to discredit his intel-ligence, depress his salary, and deny him sufficient con-tinuing legal education (CLE) to maintain his profession-al credentials. He attributed this to his race (African-American), color (black), age (born 1947) and physical handicaps (including severe skin discoloration from atop-ic dermatitis). Petitioner requested a salary adjustment to correct the pay disparity, and uniform compliance with newly adopted salary and training rules.

Following an inconclusive final interview letter from the agency's EEO investigator, Petitioner filed a Formal Complaint on November 16, 1994. Petitioner's Formal Complaint describes and documents a pattern of discriminatory behavior, apparently being practiced by his supervisors since 1987, in the course of which Peti-tioner was being

denied sufficient CLE to maintain his professional credentials, and his salary was being deter-mined on the basis of unsubstantiated and exaggerated accusations, impugning his intelligence and the value of his work. The agency EEO investigator interpreted the issues for investigation as, "You have been under-evalu-ated, paid at a lower rate, and not provided with an op-portunity for choice details."

Between September 5 and November 29, 1995, Pe-titioner amended the complaint to include additional ex-amples of disparately adversarial supervision, including insults to his intelligence, expressions of contempt for the value of his work, refusal to approve an obviously meri-torious training request, and announcement of an ar'ti-cially narrow definition of advocacy that excluded only him. Omission of his computer work from the office newsletter *Password* was mentioned as an example of his supervisors' practice of ignoring his creditable work. Pe-titioner advised the investigator that his workplace had become too hostile for him to function effectively as an advocate, and, by copy, requested that the General Counsel either place him on administrative leave or re-assign him until the

complaint was resolved. The General Counsel ignored Petitioner's request, and the agency EEO investigator interpreted the issues for investigation as follows:

> "(1) on August 31, 1995, he was badgered, insulted and removed from a Board of Contract Appeals (BCA) assignment, (2) on September 21, 1995, he was denied a training request, his Attor-ney Compensation System (ACS) evaluations are inherently discriminatory toward him as they were highly weighted toward advocacy as opposed to a broader application of duties that he performed, and, (4) he was not given appropriate recognition for innovation and application of computer technology in the November 1995 issue of PASSWORD."

On April 8, April 12, May 22, and December 9. 1996, Petitioner filed amendments to the complaint, pur-suant to 29 C.F.R. §1514.106(d), reporting examples of the pattern as they occurred, including the unnecessary removal of a computer phone line from his office, a dis-parate allocation of settlement authority, denial of an interview for an executive

position in a client depart-ment, and an ongoing demand that Petitioner represent the Postal Service in EEO cases while his own EEO pro-ceeding was pending. The agency did not acknowledge these amendments, as required by 29 C.F.R. §1514.106 (e).

On February , 1997, the agency issued to Petitioner a copy of the investigative file along with a "Notification of Completion of USPS Investigation," and a notice that Petitioner could request a hearing before an EEOC Administrative Law Judge, or a final agency decision from the agency. Petitioner responded with a "Motion to Complete Investigative ile," arguing that the file was not sufficiently complete to enable him to make that election, and requesting the addition to the file of, inter alia, the two most recent amendments, and hire dates or law school graduation dates of similarly situated attorneys to compare with the race and salary data already in the file.

On October 6, 1997, the agency issued a Final Agency Decision, describing the issues in the complaint as the four defined by the EEO

investigator in 1995, and finding, as to each such issue, that Petitioner had failed to establish a prima facie case of discrimination or retaliation, and failed to rebut the agency's "articulated legitimate nondiscriminatory reasons" for its actions. Petitioner filed his Notice of Appeal and Memorandum in Support of Appeal on October 21, 1997.

A subsequent administrative complaint, filed as a request for counseling on February 23, 1999, was await-ing hearing before an EEOC Administrative Law Judge when the 1997 appeal was decided; it was dismissed pursuant to 29 C.F.R. §1614.409 when this civil action was filed.

On July 7, 2001, the EEOC Office of Federal Op-erations issued a decision, finding that, as to the four is-sues defined by the agency investigator, Petitioner had established a prima facie case of discrimination, except on the basis of disability, but had failed to establish that the agency's articulated reasons for its actions were a pretext for discrimination or retaliation.

On August 27, 2001, Petitioner filed a request for reconsideration with the EEOC. The EEOC issued its denial of reconsideration on November 20, 2001.

This civil action was filed on February 5. 2002. On April 18, 2002, the Postmaster General filed an Answer, and the EEOC filed a Motion to Dismiss.

Petitioner filed a Motion for Judgment on the Pleadings on April 26, 2002, challenging the Postal Service's affirmative defenses and the EEOC's grounds for dismissal. Respondents filed a Memorandum and Declaration in Opposition on May 28, 2002. The EEOC filed a Reply Memorandum on May 31, 2002, in support of its Motion to Dismiss. On June 4, 2002, Petitioner filed a Response to Respondents' Memorandum in Opposition. On June 18, 2002, the court granted the EEOC's Motion to Dismiss and denied Petitioner's Motion for Judgment on the Pleadings.

On July 16, 2002, the remaining parties filed a Joint Case Management Statement. The Joint Case Management Conference was held on July 17, and the court issued its scheduling Order on July 18, 2002, setting January 31, 2003 as the general discovery cut-off date and March 11, 2003 as the motion cut-off date.

In an effort to elicit comparative data regarding similarly situated employees, and cure

Respondent's evasive discovery responses, Petitioner entered into a Stipulation and Protective Order, filed December 20, 2002, and filed a Nondisclosure Agreement on January 16, 2003.

Respondent issued his final evasive discovery responses on January 28, 2003, and filed his Motion for Summary Judgment, and Declaration in Support, on February 4, 2003.

Petitioner filed a Cross Motion for Summary Judgment, and Declaration in Support, on February 13, 2003. Respondent filed a Memorandum and Declaration in Opposition to the Cross Motion on February 24, 2003.

On February 28, 2003, Respondent filed a Reply Brief in support of his Motion for Summary Judgment. On March 3, 2003, Petitioner filed a Memorandum and Declaration in Support of his Cross Motion, arguing that Respondent's fabrications and evasions of discovery discredit his affirmative defenses, and should be construed as admissions. On March 24, 2003, at the behest of the court, Petitioner filed a Memorandum and Declaration in Opposition to the Motion for Summary Judgment. Respondent filed a Reply and Declaration in Support,

on April 4, 2003.

A motion hearing was held on April 18, 2003, and, on June 17, 2003, the court issued an Order granting Respondent's motion and denying Petitioner's motion. Judgment in favor of Respondent was issued on June 19, 2003. Petitioner's notice of Appeal was filed June 30, 2003.

In an unpublished opinion, the Ninth Circuit affirmed the District Court, on the premise that "there is no private cause of action against the EEOC for their handling of an individual's claims," (citing *Ward v. EEOC*, 719 F.2d 311, 313 [9th Cir. 1983]) and "even as-suming Jackson established a prima facie case, he failed to present evidence sufficient to create a genuine issue of material fact as to whether defendants' legitimate non-discriminatory reasons for their actions were pretextual." (citing *Snead v. Metro Prop & Cas. Ins. Co.*, 237 F.3d 1080, 1093-93 [9th Cir. 2001], and *Chuang v. Univ. of Cal. Davis. Bd. Of Trs.*, 225 F. 3d 1115, 1127 [9th Cir. 2000]).

The Ninth Circuit also ruled that the district court had properly ruled against Petitioner on the invol-untary servitude issue "because he failed to present any evidence that his employment with the

postal service was involuntary."

The Ninth Circuit denied Petitioner's petition for rehearing en banc on March 9, 2005.

FACTS

Petitioner is an African-American male, born June 6, 1947. He graduated from Harvard College in 1970, and from Harvard Law School in 1973. Petitioner began employment for the U.S. Postal Service on Septem-ber 4, 1984, as an Assistant Regional Counsel, at its Western Regional Office in San Bruno, California,

In 1986, all Regional attorneys were incorporated into a system-wide "Office of Field Legal Services," and came under the supervision of a Law Department, based at Postal Service headquarters in Washington, DC. In 1987, the Law Department replaced the objective "EAS" performance appraisal criteria with a totally subjective system of ratings called the "Attorney Compensation System" (ACS).

Under the ACS, all salary adjustments were to be "based on a documented appraisal of performance" which had been "reviewed with individual attorneys by their immediate managers

before being sent on," and the "documented appraisal of performance" was to be based on factors identified on the appraisal-of-performance form, focusing on "the attorney's expected value to the Postal Service for the coming fiscal year, based on per-formance and growth in the prior fiscal year."

Following adoption of the ACS, Petitioner's sal-ary adjustments were based on reports, often false or ex-aggerated,, which had not been reviewed with Petitioner by his immediate manager. The salary adjustments of the similarly situated Caucasian male attorneys were deter-mined in accordance with the standard prescribed by the ACS guidelines.

The Law Department provided sufficient continu-ing legal education (CLE) for Caucasian male attorneys to maintain their professional credentials, but refused to provide the same for Petitioner.

From September 1996 until the constructive term-ination of his employment on June 11, 1999, Petitioner was required, as a condition of continued employment, to represent the Postal Service in EEO litigation, despite his objection that such representation placed him in a con-flict of interest under Rule 1.7 of the ABA Model Rules of

Professional Conduct.

On April 17, 1997, Petitioner took indefinite leave under the Family and Medical Leave Act, and applied for Workers Compensation, based on aggravated depres-sion and debilitating psychological stress. Petitioner ex-hausted his annual leave and sick leave in July of 1997, but remained on leave without pay until August 4, 1998, at which time he was allowed to return to work, condi-tioned on his willingness to represent the Postal Service in EEO cases.

On February 12, 1999, Petitioner filed a Request for Counseling, based on a memorandum from his super-visor threatening him with removal or prosecution for using the office computer for personal purposes. Peti-tioner's Request and subsequent complaint compared the Law Department's treatment of Petitioner as an ad-versary with its treatment of other attorneys as their ad-vocate, and compared the department's reluctance to re-ward his computer skills with its apparent eagerness to punish them. His complaint described his treatment as "slavery pro tanto" to the extent he was being forced into conflict of interest and

deprived of the pay he had earned while his reputation was being demeaned to convince him of his unemployability outside the Postal Service.

The agency EEO investigator defined the issues as, "Accused of violating a federal law by using the office computer for non-work related purposes. Forbidden from using the computer for anything other than work purposes. Threatened with removal and/or prosecution. Ordered to answer interrogatories regarding 411 internet web sites."

Petitioner amended the complaint on May 7 and June 4, 1999, the latter by email to the EEO investigator, with a copy to the Chief Postal Inspector, requesting that the Inspection Service investigate the case. The text of the email contained the statement, "I'm going to do my best to protect the interests of the Postal Service, but if somebody doesn't protect me from the Postal Service in the meantime, I can't be responsible for what they do to me from now on."

Petitioner's supervisor interpreted this statement as a threat of violence and barred him from his work-place until a fitness-for-duty examination could be per-formed. On June 11, in the

presence of his coworkers, Petitioner was removed from his office under Inspection Service escort.

The examining physician found that continuing to work in the same office would be harmful to Petitioner's physical and mental health, and might result in self-de-structive behavior if complicated by other factors. On July 17, 1999. after receiving this report, Petitioner's su-pervisor converted his paid administrative leave to leave without pay, effectively July 19.

On July 21, 1999, the agency EEO investigator sent Petitioner a copy of the investigative file and "Notice of Completion of USPS Investigation." On August 6, 1999, Petitioner submitted a request for hearing, and shortly thereafter initiated discovery requests.

Also on August 6, 1999, Petitioner appealed his placement on enforced leave without pay to the Merit Systems Protection Board (MSPB). The appeal was dis-missed for lack of jurisdiction on December 6. On De-cember 16, Petitioner requested that the record of MSPB proceedings be incorporated into the EEOC record, pur-suant to 29 C.F.R. 1614.302(c)(2)(ii).

On November 2, 1999, Petitioner's supervisor is-sued him a notice of proposed removal from Postal Ser-vice employment, and a proposal to exclude him from the EVA Variable Pay Program credit for Fiscal Year 1999.

Petitioner responded on November 10, defending his work and requesting that the EEO issues be resolved before termination of his employment. His supervisor re-sponded on November 24 that he would continue to seek Petitioner's removal.

Petitioner received no performance appraisal for the 1998-99 fiscal year. The salary increase earned by Petitioner was paid instead to other attorneys, dispropor-tionately to Caucasian males Michael Propst ($3,154), Peter Rittling ($3,100), and Robert O'Connell ($3,000). The caseload statistics reported during discovery inflated the numbers in the raw data by a disproportionate amount in favor of Caucasian males Michael Emery (1900%), Eric Scharf (1900%) and Michael Propst (1450%).

Still unable, after a motion to compel discovery, to get hire dates or law school graduation dates of the other Law Department attorneys,

Petitioner filed a Motion for Sanctions with the EEOC, on March 6, 2000, describing delays, evasions and falsifications in the agen-cy's discovery responses. The EEOC took no action.

- On March 16, 2000, Law Department Headquar-ters issued a letter of decision, removing Petitioner from Postal Service employment, effective March 24, 2000, on the ground that returning him to his position "would be harmful to [you], would result in a higher level of depres-sion, and, if complicated by other factors, might result in you engaging in self-destructive acts."

On March 22, 2000, Petitioner submitted a Re-port of Further Retaliation to the EEOC, requesting that the Administrative Judge order Respondent to rescind the removal decision pending decision on the merits in the EEO proceedings. By copy of the same document, Petitioner appealed his removal to the General Counsel and notified the agency EEO investigator.

The agency appointed its own hearing officer to preside over its own removal hearing. The hearing officer granted Petitioner's request that the agency make available the doctor who had

performed the fitness for duty examination, but refused to allow the EEO record to be considered as part of the removal proceeding.

The removal hearing was held on June 5 and 6, 2000. Nothing from the EEO investigative file was considered and the agency did not make the doctor available. The hearing decision came on January 23, 2001, in the form of a "Step 1" decision from Deputy General Counsel William R. Gilligan at Law Department Headquarters, affirming Petitioner's removal on the ground that, "your failure to see yourself as being at fault in most of the ways your managers described and to recognize your own responsibility to address problems demonstrated maladaptive behavior that would preclude you from ever fitting into the work environment."

Petitioner filed a Motion for Summary Judgment with the EEOC, arguing, inter alia, that fabrications and inconsistencies made the agency's explanations clearly identifiable as pretexts, and that retaliation was admitted in Mr. Burroughs' letter, identifying Petitioner's email to the EEO investigator as the basis for his decision to have Petitioner removed from his office. The agency did not respond.

The EEOC took no action.

Following Mr. Gilligan's instructions, Petitioner addressed an appeal to Labor Relations Vice President Anthony Vegliante at Postal Service Headquarters, argu-ing, inter alia, that EEO documents were kept out of the record, and that the behavior of agency supervisors was part of a discriminatory pattern. Mr. Vegliante issued a letter on March 21, 2001, upholding the ter-mination of Petitioner's employment, reasoning that "the record does not provide the requisite proof of illegal discrimination" to support Petitioner's assertions. On April 9. 2001, Peti-tioner filed a copy of the letter with the EEOC, with a de-claration reporting continuing discrimination and retali-ation.

ARGUMENT

1. Does the District Court have jurisdiction under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, to review decisions of the U.S. Equal Employment Opportunity Commission in Federal Sector EEO complaints?

The Ninth Circuit upheld the district court's ruling that there is no private cause of action against

the EEOC for its handling of an individual's claims, citing *Ward v.EEOC*, 719 F.2d 311 (9th Cir, 1983). Petitioner had argued that *Ward* was distinguishable, since he was not seeking damages against the EEOC, only equitable relief, in the nature of mandamus. The district court had rejected this distinction as irrelevant.

The *Ward* decision is based on the theory that de novo review provides an adequate remedy in a court, within the meaning of 5 U.S.C. §704, for complaints about the EEOC's administrative process, precluding an APA challenge to the EEOC's procedures. *See Ward v. EEOC*, 719 F.2d 311, 313-14 (9th Cir. 1983).

The adequacy of trial de novo as a remedy, how-ever, depends on the ability of an overworked district court to avoid being misled by the agency's superior abi-lity to distort and obscure the facts. Judicial review of the EEOC,'s final decision enables the court to review the entire administrative record, and reduces the likeli-hood that a meritorious claim will be distorted by the agency and dismissed on summary judgment before it ever reaches the trier of

fact. Petitioner therefore sub-mits that it is sounder jurisprudence to allow a plaintiff the option of trial de novo or judicial review of the admi-nistrative record. See *Chandler v. Roudebush*, 425 U.S. 840, 859-864 (1976) (describing a historical preference for APA review over trial de novo in federal sector Title VII cases). Moreover, one might well question whether an EEO complainant receives due process of law where his right to have his prima facie case heard by a jury is controlled by the agency's ability to formulate what pur-ports to be a non-discriminatory rationale while control-ling interpretation of the complaint, seriousness of the in-vestigation and access to agency records.

2. Does a federal agency's failure to acknowledge amend-ments to an EEO complaint and refusal to produce re-cords relevant to material issues justify summary judg-ment in favor of an EEO complainant?

It is well settled that, when a party is responsible for the loss or destruction of important evidence, an ad-verse inference can be drawn against that party on the issues to which the evidence would relate, and that such an adverse inference is

generally appropriate when the party can reasonably be faulted for the loss or destruc-tion. See, e.g., *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998) (negative inference proper; "[w]e have held with some regularity that a trier may . . . infer from a party's obliteration of a document relevant to a litigated issue that the contents of the document were un-favorable to that party"); *Pressy v. Patterson*, 898 F.2d 1018, 1024 (5th Cir. 1990) (negligent failure of a party to retain tapes of an interview would justify deeming cer-tain facts reported in the press as being conclusively ad-mitted); *Cole v. Keller Industries, Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998) (destruction of evidence may permit an adverse inference); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (adverse inference from destruction of documents); *Welsh v. United States*, 844 F.2d 1239, 1247 (6th Cir. 1988) (adverse inference available against party that negligently lost evidence).

Federal regulations governing EEOC enforcement of Title VII and the Rehabilitation Act in the federal sec-tor apply an analogous policy where an agency fails with-out good cause to provide evidence relevant to a material issue. 29 C.F.R.

§1614.108(c)(3); 29 C.F.R. §1614.109 (f)(3). Accordingly, the EEOC interprets 29 C.F.R. §1614.108(b) to require that, when an agency fails to pro-perly investigate timely complaints, the resulting eviden-tiary deficiencies may be assessed against the agency. *See Rhodes v. U.S. Postal Service*, EEOC No. 01994888 (December 18, 2001). Where, as here, the agency has not only refused requests for comparative data on simi-larly situated employees since 1997, but repeatedly ig-nored amendments to the complaint, and interpreted its pattern-and-pattern aspect as a series of unrelated inci-dents,[1] an intent to conceal the agency's culpability is the only inference that can be reasonably drawn. Such an inference requires summary judgment in favor of Petitioner.

3. Does evidence of involuntary servitude raise a question of fact sufficient to rebut an agency's otherwise nondis-criminatory explanation of its treatment of an African American male?

Rule 1.7 of the ABA Model Rules of Professional Conduct prohibits representations that "may be mater-ially limited by the lawyer's responsibilities to another client or to a third person,

or by the lawyer's own inter-est, unless: (1) the lawyer reasonably believes the repre-sentation will not be adversely affected, and (2) the client consents after consultation."

Yet Petitioner was required, as a condition of con-tinued employment, to represent the agency in EEO liti-gation while his own EEO proceedings were pending, de-spite his objection that such representation would be ad-versely affected by Petitioner's own interest, and despite the agency's own "articulated nondiscriminatory explan-ation" that Petitioner's professional judgment was al-ready irretrievably bad.

Petitioner submits that this was involuntary servi-tude, which is defined in *U. S. v. Kozminski*, 487 U.S. 931 (1988) as existing when "the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." In retrospect, that turned out to be the physical removal of Petitioner from his office by a Postal Inspector, and the prospect of fac-ing a United States Attorney armed with the argument that he is "too maladaptive to ever fit into the work en-

vironment."

The district court's 1992 opinion describes Peti-tioner's involuntary servitude allegation as frivolous, citing *U. A. W. v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), in support of the premise that Peti-tioner's freedom to terminate his employment obviates a 13th Amendment claim. However, Petitioner is not trying to plead a discrete cause of action under the 13th Amend-ment. He is simply trying to demonstrate the extent of his employer's discriminatory behavior, and arguing that the application of this "badge of slavery" is one of the signals that identifies an intent to discriminate on the basis of race.

His supervisors' attempts to discredit his intell-igence[2] suggest the hypothesis that they may be punish-ing him for his Harvard degrees: for having, in effect, as a presumed beneficiary of affirmative action, deprived two presumably more deserving white students of a Har-vard education. This could explain why they deny him the respect other Harvard graduates enjoy, and refuse to allow him to exercise his independent professional judg-ment on an issue only he could possibly be qualified to decide: his

ability to represent a client without a personal conflict of interest.

CONCLUSION

This case presents issues of great public importance. The Ninth Circuit believes that the only appeal from an adverse decision by the EEOC in a federal sector Title VII or Rehabilitation Act case is a trial de novo. This is apparently causing the district courts to waste valuable time and resources creating new records (which are likely to be distorted by agency manipulation) where review of the existing administrative records would be more expedient, produce a clearer picture of the parties' circumstances, and might actually be preferable to the parties. It is also obvious, from the diversity of opinions on evidence spoilation, that the lower courts would bene-fit from this Court's formulation of some guiding princi-ple to deal with the conflict a federal agency faces when it is given a duty to investigate and discipline itself.

There should be little doubt that infliction of *Koz-minski* type involuntary servitude on any qualified pro-tected-class employee would constitute

a sufficiently ad-verse employment action to constitute a cause of action under Title VII, assuming others outside the class are treated better. However, to an African American, invol-untary servitude is a badge of slavery, which should constitute sufficient evidence of race-based discrimination to rebut an employer's otherwise nondiscriminatory explan-ation. Where there is also evidence of mendacity on the part of the employer, such as evidence concealment or spoilation, summary judgment in favor of such an emplo-yee should not seem inappropriate. In any event, if the Ninth Circuit is allowing the district courts within its jurisdiction to define involuntary servitude by 1949 stan-dards, some guidance from this Court may be necessary.

Wherefore the Petitioner respectfully requests that this Honorable Court grant certiorari and reverse the holding below.

Respectfully submitted,

_____

Charles Thomas Jackson

FOOTNOTES

[1] **Piecemeal interpretation of pattern and practice complaints is a staple of Respondent's EEOC practice. Virtually every EEOC decision involving the Postal Service cites *Meaney v. Department of Treasury*, EEOC No. 05940169 (November 3, 1994) (holding that an agency should not ignore the "pattern aspect" of a complainant's claims and define the issues in a piecemeal manner where an analogous theme unites the matter complained of). See, e.g., *Santiago v. United States Postal Service*, EEOC No. 01A44396 (November 4, 2004); *Van Dorp v. United States Postal Service*; EEOC No. 01A43307 (September 10, 2004); *Nimmo v. United States Postal Service*, EEOC No. 01A42244 (June 16, 2004)**

[2] **The extent of this effort became apparent to Petitioner only after the conclusion of litigation, when his former secretary Lynn Castle mailed him his personnel file, which the agency had ordered her to dispose of. The file contained an intraoffice memorandum demonstrating how Petitioner's salary adjustments had been determined. It should have been produced in response to Petitioner's administrative level requests for production in 1999. It is in the Appendix at page J-1.**

APPENDIX TO PETITION

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES THOMAS JACKSON,
Plaintiff - Appellant,
v.
JOHN E. POTTER, Postmaster General; et al.,
Defendants - Appellees.

No. 03-16249
DC# CV-02-00632-JSW
ORDER

FILED
MAR 09 2005
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: GOODWIN, WALLACE and TROTT, Circuit Judges

Judges Trott, Goodwin, and Wallace recommend that Jackson's petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

No further filings will be accepted in this closed appeal.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES THOMAS JACKSON,
Plaintiff-Appellant,
v.
JOHN E. POTTER, Postmaster General; et al., Defendants-Appellees.

No. 03-16249
DC# CV-02-00632-JSW
MEMORANDUM*

FILED
DEC 10 2004
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted December 6, 2004**

Before: GOODWIN, WALLACE, and TROTT, Circuit Judges.

Charles Thomas Jackson appeals pro se the district court's judgment in favor of defendants in his action alleging employment discrimination, retaliation, and involuntary servitude. We have jurisdiction pursuant to 28 U. S.C. § 1291. Reviewing de novo, *Karam v. City of Burbank*, 352 F.3d 1188, 1192 (9th Cir. 2003), we affirm.

The district court properly dismissed defendant

Equal Employment Opportunity Commission ("EEOC") because there is no private cause of action against the EEOC for their handling of an individual's claims. See *Ward v. EEOC*, 719 F.2d 311,313 (9th Cir. 1983).

The district court properly granted summary judgment on Jackson's various discrimination and retaliation claims because, even assuming Jackson established a prima facie case, he failed to present evidence sufficient to create a genuine issue of material fact as to whether defendants' legitimate non-discriminatory reasons for their actions were pretextual. *See Snead v. Metro. Prop. & Cas. Ins Co.*, 237 F.3d 1080, 1093-94 (9th Cir. 2001); *cf. Chuang v. Univ. of Cal. Davis. Bd, of Trs.*, 225 F.3d 1115, 1127 (9th Cir. 2000).

The district court also properly granted summary judgment on Jackson's, involuntary servitude claim because he failed to present any evidence that his employment with the postal service was involuntary.

We have considered Jackson's remaining contentions and conclude that they lack merit

Jackson's request for attorney's fees is denied.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument.. See Fed. R. App. P. 34(a)(2).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES THOMAS JACKSON,
Plaintiff-Appellant,
v.
JOHN E. POTTER, Postmaster General; et al.,
Defendants-Appellees.

No. C 02-632-JSW
JUDGMENT AFTER HEARING

FILED
JUN 19 2003
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

This action came on for hearing before the Court and the issues having been fully heard, and the Court having granted Defendant United States Postal Service's motion for summary judgment and denied Plaintiff Jackson' s cross-motion for summary judgment, IT IS HEREBY ORDERED AND ADJUDGED that the complaint is dismissed with prejudice. The (lerk is directed to enter judgment in favor of Defendant United States Postal Service.

IT IS SO ORDERED.

Dated: JUN 19 2003
s/_____
JEFFREY S. WHITE,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES THOMAS JACKSON,
Plaintiff-Appellant,
v.
JOHN E. POTTER, Postmaster General; et al.,
Defendants-Appellees.

No. C-02-632-JSW
ORDER GRANTING USPS'S
MOTION FOR SUMMARY JUDGMENT;
DENYING JACKSON'S MOTION FOR
CROSS-SUMMARY JUDGMENT

FILED
JUN 17 2003
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff Charles Thomas Jackson is an African-American male attorney appearing pro se. He brings the iustant action against his former employer, the United States Postal Service ("USPS"), alleging employment discrimination and retaliation pursuant to Title Vii of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, et seq. The Court has jurisdiction pursuant to 29 U.S.C. § 1331.

Currently before the Court is USPS's motion for summary judgment and Jackson's cross-motion for

summary judgment. After consideration of the papers, and having had the benefit of oral argument, the Court GRANTS USPS's motion for summary judgment and DENIES Jackson's cross-motion for summary judgment.

FACTS and PROCEDURAL HISTORY

Jackson graduated from Harvard Law School in 1973. On September 4, 1984, the United States Postal Service hired Jackson as Assistant Regional Counsel in San Bruno. California. Throughout his employment with the Postal Service Jackson had performance issues, resulting in negative assessments from as early as 1987 and continuing until the end of his tenure with the Postal Service. (Declaration of Chinhayi Coleman In Support of Defendants' Motion for Summary Judgment "Coleman Dec." Exh. A at 341 .) The record is replete with instances of deficiencies in Jackson's conduct and lapses of professional judgment. Among the most remarkable, in the late 1980's Jackson's performance before an administrative law judge was so unsatisfactory that the ALJ called Jackson's supervisor to complain. This resulted in Jackson being removed from all litigation matters that would involve making oral presentations before judges. (Id. at 68, 211-215,459.) Jackson repeatedly gave advice and entered into settlement agreements that were contrary to USPS policy or

regulation. Jackson also encountered problems when assigned to work with a more-experienced colleague on a Board of Contract Appeals assignment. Jackson resisted the arrangement, failing to confer and receive approval prior to taking actions in the case, and ultimately requested to be relieved from the case. (Complt. Exhs. C-F.) By the late-1990's, Jackson's conduct took a more hostile turn. When confronted by his supervisor regarding unacceptable work product, Jackson knocked items off of his desk, brushed by the supervisor making physical contact with him, and told him to "get the f out of my way." (Coleman Dec. Exh. A at 382-83.) Jackson discussed the potential for violence in e-mail communications to an Equal Employment Opportunity ("EEO") Investigator and the Cinef Postal Inspector: "Sir: I apologize for embroiling you in what could be construed as my own personal problem; but in the interest of preventing violence in the workplace, I feel constrained to report behavior apparently calculated to elicit violence." (Complt. Exh. V.)

On May 18, 1994, Jackson first sought EEO counseling alleging discrimination om the basis that his "Attorney Compensation System (ACS) evaluations were inherently discriminatory toward him as they were highly weighted towards advocacy as opposed to a broader

application of duties that he performed" and that "he was not given appropriate recognition for innovation and application of computer technology in the November 1995 issue of PASSWORD." (Coleman Dec. Exh. C.) Following an interview process wtth the EEO counselor, Jackson filed a formal EEO complaint of discrimination on November 9, 1994.

On September 5, 1995, Jackson again sought EEO counseling, alleging that he was discriminated against when (1) on August 31, 1995, "he was badgered, insulted and removed from a Board of Contract Appeals (BCA) assignment," and (2) on September 21, 1995 he was denied a training request. (Id.) On December 22, 1995, Jackson filed a second formal EEO complaint. The alleged discrimination in both complaints was based on race (African-American), color (Black), age (47), and disability (atopic dermatology or discoloration of the skin, vocal cord abnormality restricting the range of his voice, and until July of 1994 glaucoma and cataracts). (Id.) The complaints additionally cited the following officials as responsible for the alleged acts of discrimination: (1) William Bennett, Associate General Counsel; (2) Perry Johnson, Chief Field Counsel; (3) Doris Godinez-Phillips, Deputy Chief Counsel; (4) Charles Kappler, Deputy General Counsel; and (5) Mary

Elcano, General Counsel. (Id.) The EEOC incorporated the two com-plaints into one investigation and assigned the case the single agency Case number, No. H0-0035-95.

Following investigation of his complaint, Jackson was advised that he had the option of requesting either an oral hearing by an EEOC administrative judge or a final agency decision without a hearing. Jackson opted for the later. (Coleman Dec. Exh. C at 2.) The USPS issued a final agency decision ("FAD") on October 6, 1997, finding no merit to Jackson's claims of discrimination and retaliation. (Id.) Jackson timely appealed to the EEOC's Office of Federal Operations, which affirmed the FAD on July 27, 2001. (Coleman Dec. Exh. H.)

In April 1997, Jackson's psychiatrist advised him to take a leave of absence from work while Jackson resolved his anger management problems. (Coleman Dec. Exh A at 393-395.) Jackson testified that he decided to follow this recommendation because he "thought [he] was in danger of becoming unpro-fessional." (Id. at 393.) Jackson additionally made the state-ment during a fitness for duty examination that he "felt that if had been in the office when [his supervisor] came back one of [them] was going to be hurt." (Id. at 397.) As a result Jackson "stayed out of work" from April 1997 through August 1998 for stress-related

symptoms. (Id. at 379-80.) In August of 1998, the San Francisco office underwent a change of manage-ment. Thereafter, Jackson's psychiatrist recommended that Jackson could return to work.

On March 30, 1999, Jackson filed another formal EEO complaint, Agency Case No. H0-0059-99 This complaint again alleged discrimination based on race, color, and disability, atoptc dermatitis, depression/anxiety disorder), and included a new claim of retaliation based on pnor EEO activity under Title VII. (Coleman Dec. Exh. B.) The complaint alleged that on February 22, 1999, Jackson had been "[alccused of violating federal law by using the office computer for non-work related purposes, [f]orbidden from using the computer for anything other than work purposes, [t]hreatened with removal and/or prosecution," and "[o]rdered to answer interrogatories regarding 411 interact sites." (Id.)

On June 11, 1999, Jackson was placed on administra-tive leave based on his supervisor's assessment that Jackson could pose a threat of physical harm to either himself or his superior. (Coleman Dec. Exh. A at 421,423 and Exh. 35 attached thereto; Cornpt. Exh. 1I.) Jackson agreed to undergo a fitness for duty evaluation shortly thereafter. On November 2, 1999, Jackson's supervisor sent him a letter notifying him that in light of the assessment

that he was unfit for duty, he could either resign from the Postal Service or apply for disabilityretirement. (Complt. Exh. Y.)

Following correspondence with the Postal Service, including submissions from Jackson's treating psychiatrist, the Deputy General Counsel of the U.S. Postal Service issued a decision that "the evidence supports the conclusion that you are not fit for duty and that the penalty of removal is warranted." (Complt. Exh. FF.) Jackson requested a hearing, which was conducted in June 2000, and included testimony from several postal service personnel and Jackson himself. (Complt., Exh. II.) On January 23, 2001, the Deputy General Counsel issued a Step I decision following Jackson's removal hearing, affirming the decision to terminate Jackson's employment. (Id.)

Jackson's tenure with the Postal Service ended in 2000, based on a determination that Jackson was not fit to perform the duties of his position of Attorney. (Complt. Exh. 1I.)

On February 5, 2002. Jackson filed a lengthy verified Employtaunt Discrimination Complaint against the USPS and the EEOC, alleging that the USPS subjected him to discrimination and retaliated against him for his protected EEO activity, and that the EEOC improperly

refused to compel the USPS to comply with Title VII and the Rehabilitation Act. By way of relief, Jackson seeks among other things, reinstatement of his position with the Postal Service. an award of the appropriate front pay, to be rehired by the Postal Service but in a position outside of the legal department at the salary level approximating that of a white male attorney with equal education and postal experience, and the expungement from his personnel file all references to the removal proceedings. The EEOC moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6); Jackson moved for judgment on the pleadings or in the alternative for summary judgment. On June 18, 2002, this Court found that Jackson failed to allege any cognizable causes of action against the EEOC and dismissed the agency from the suit. In the same order, the Court additionally denied Jackson's motion for judgment on the pleadings.

On February 4, 2003, the USPS filed a Motion for Summary Judgment. Jackson did not file an opposition; rather, on February 13, 2003, Jackson filed a Cross-motion for Summary Judgment. Because Jackson is proceeding pro se, the Court postponed the hearing set for March 14, 2003, and issued an order notifying Jackson of his obligation to file an opposition to the USPS's motion for summary

judgment, warning him that he risked dismissal of his case, and ordering him to file an opposition by March 26, 2003. Jackson filed an opposition on March 24, 2003, and the USPS filed a reply on April 4, 2003. The Court discusses the USPS's motion for summary judgment and Jackson's cross-motion for summary judgment in turn.

DISCUSSION

A. USPS's Motion for Summary Judgment

1. Legal Standard

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect the outcome of the case. *Id.* at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A principal purpose of the summary judgment procedure is to

identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *Id.* at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Id.* Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (stating that it is not a district court's task to "scour the record in search of a genuine issue of triable fact") (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

2, Analysis

(i) Exhaustion of Administrative Remedies

As a preliminary matter, the USPS asserts that Jackson is limited in this suit to those claims that he exhausted before the EEOC. In order to establish federal subject matter

jurisdiction, Jackson was required to exhaust his EEOC administrative remedies before seeking federal adjudication of his claims. *See EEOC v. Farmers Bros. Co.*, 31 F.3d 891,899 (9th Cir. 1994).[1]

Under Title VII, a plaintiff must exhaust his administrative remedies by filing a timely charge with the EEOC, or appropriate state agency, thereby affording the agency an oppor0mity to investigate the charge. 42 U.S.C. § 2000e-5(b). "The administrative charge requirement serves the important purposes of giving the charged party notice of the claim and 'narrowing the issues for prompt adjudication and decision." *B.K.B.v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002) (internal quotation marks and citations omitted). In determining those issues over which jurisdiction lies, the court should construe the charges made before the EEOC "with the utmost liberality." *Farmer Bros. Co.*, 31 F.3d at 899. "The crucial element of a charge of discrimination is the factual statement contained therein." *B.K.B.*, 276 F.3d at 1100 (quoting *Sanchez v.*

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[1]In his opposition to the USPS's motion for summary judgment Jackson essentially ignores the exhaustion issue, asserting that "Defendant's attempts to contrive an exhaustion defense demonstrates Defendant's total lack of credibility. The Law Department and the U.S. Attorney's office should be sanctioned under Fed.R. Civ.P Rule 1 l(c)(1)(B) for presenting it to the court." (Opp. Br. at 4.)

Standard Brands, Inc., 431 F.2d 455,462 (5th Cir. 1970)). Section 2000e-5(e)(1) sets out the timing within which a plaintiff must file the charge. The statute precludes recovery for discrete acts of discrimination or retaliation that occur outside of the statutory period; however, in hostile work environment claims, the court may consider the entire scope ot the alleged hostile behavior including those acts that may fall outside of the statutory time period. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,105 (2002).

A review of the record demonstrates that prior to initiating the instant matter in federal court Jackson filed two formal EEO complaints, case nos. H0-0035-95 and H0-0059-99. In these complaints, Jackson raised claims of discrimination based on race (African American), color (Black), age (47), disability (atopic dermatology or discoloration of the skin, vocal cord abnormality restricting the range of his voice, and until July of 1994 glaucoma and cataracts), and retaliation based on prior EEO activity under Title VII. The charges made before the EEOC related to specific instances of discrimination, namely that: (1) "Attorney Compensation System (ACS) evaluations were inherently discriminatory toward [Jackson] as they were highly weighted towards advocacy as opposed to a broader

application of duties that he performed;" (2) "[Jackson] was not given appropriate recognition for innovation and application of computer technology in the November 1995 issue of PASSWORD;" (3) on August 31, 1995 "he was badgered, insulted and removed from a Board of Contract Appeals (BCA) assignment;" (4) on September 21,1995, he was denied a training request; and (5) on February 22, 1999, Jackson had been "[a]ccused of violating federal law by using the office computer for non-work related purposes, [f]orbidden from using the computer for anything other than work purposes, [t]hreatened with removal and/or prosecution," and "[o]rdered to answer interrogatories regarding 411 internet sites." (Coleman Dec. Exhs. B & C.)

On March 27, 2000, Jackson filed a Report of Further Retaliation in Agency Case No. H0-0059-99, detailing Jackson's receipt of the removal letter and requesting the ALJ to order the Postal Service to rescind the letter. (Complt. Exh. GG.) On February 20, 2001, Jackson filed a motion for summary judgment in the same case, again raising issues surrounding his termination. (Complt. Exh. KK.) These allegations therefore are within the ambit of the predicate EEOC charge and subject matter jusdiction extends over the underlying allegations of discrimination.

See B. K.B., 276 F:3d at 1099-1100. The Court's jurisdiction, however, is limited to Jackson's claims of discrimination alleged in his federal complaint.[2],[3]

(ii) Discrimination on the Basis of Race and Color

Jackson's race and color discrimination claims under Title VII are premised on a theory of disparate treatment in the workplace. In order to succeed on those claims, Jackson must. demonstrate that the USPS "intended to discriminate against him." *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409 (9th Cb:. 1987). Jackson bears the initial burden of establishing a prima facie case of discrimination by that showing that "(1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Chuang v. Univ. of Calif. Davis, Bd. of Trustees,*

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[2]Jackson did not exhaust his Thirteenth Amendment claim of involuntary servitude and as such this Court lacks subject matter jurisdiction over this cause of action. *See28* U.S.C. § 2675; *see also McNeil v. United States*, 508 U.S. 106 (1993) (requiring, as a jurisdiction prerequisite for suing the Federal government, an administrative tort claim presented to the federal agency employing the verson whose act or omission caused the injury).

[3]In his federal complaint, Jackson abandons his age discrimination claim. *See* Complt. ¶¶ 5, 110, 114.

225 F.3d 1115, 1123 (9th Cir. 2000).

If Jackson is able to present a prima facie case of discrimination, "the burden of production, but not persuasion, then shifts to the [USPS] to articulate some legitimate, nondmcrkninatory reason for the challenged action." *Chuang*, 225 F.3d at 1123. In the event that the USPS does so, Jackson "must show that the articulated reason is pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Texas Dep 't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

The USPS asserts that Jackson is not able to meet his burden of presenting a prima facie ease of discrimination. Specifically, the USPS contends that Jackson cannot demonstrate that similarly situated individuals outside of his protected class were treated more favorably. Jackson's opposition fails to address the USPS's contention. The record demonstrates that Jackson was limited as to the types of legal work that he could undertake and that Jackson did not perform the same type of work as his co-workers. Based on poor performance, Jackson was removed from cases that required him to

appear before an administrative judge (Declaration In Support of Defendant's Reply Brief Re Motion for Summary Judgment "Coleman Rply Decl." Exh. A at 211.) Jackson admits that he is unaware of any other attorney within the department so situated. (Id. at 213.) The USPS's brief details numerous other factors that separates Jackson out from his peers, including his hostile and sometimes physical reactions to criticism from superiors, and repeated failure to follow instructions from supervisors or postal service policy. (USPS Br. at 15-16.) The Court accordingly finds that Jackson has failed to establish a prima facie case of discrimination based on race or color.

Even if Jackson had presented a prima facto case of discrimination, the USPS provides strong evidence of legitimate non-discriminatory reasons supporting Jackson's termination. Jackson admits that he had on-going performance problems running for "a pretty long time." (Coleman Rply Dec. Exh. A at 341.) Further, it is undisputed that Jackson recognized his own increasingly hostile and potentially violent behavior. (Coleman Dee. Exh. A at 393-97.)

Once the USPS carries its burden, Jackson must show that the articulated reason is pretextual. *See Chuang*, 225 F.3d at 1123. Jackson puts forth no evidence tending

to prove that his employment was terminated on the basis of race or color, rather than because of his unfitness for duty. Once the USPS put forth evidence of a legitimate, nondiscriminatory rationale for the termmation, Jackson must meet his burden of demonstrating discrimination. He has not. Even taking his conclusory and vague opposition at face value, Jackson has not raised a material issue of fact as to discrimination or as to pretext.

"At summary judgment, the court need not draw all possible inference in [plaintiff's] favor, but only all reasonable ones." *Villarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002). No reasonable jury could find that a discriminatory rationale - and not Jackson's job performance and unprofessional behavior - was the cause for his termination. Summary judgment in favor of the USPS is appropriate as to all of Jackson's claims of discrimination based on race and color

(iii) Discrimination on the basis of Disability

A federal employee's exclusive remedy for alleged disability discrimination in connection with his employment is the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, et seq. The standards used to determine whether there has been a violation of the Rehabilitation Act are those standards applied under Title I of the Americans with Disabilities Act

of 1990, 42 U.S.C. § 12111 *et seq.* 29 U.S.C. § 794. To present a prima facie case of disability discrimination, Jackson must show that: (1) he is disabled under the Act; (2) he is "otherwise qualified" for the position, with or without a reasonable accommodation; and (3) he suffered an adverse empbyment action because of his disability or was denied a reasonable accommodation. *Zukle v Regents of Univ. of Calif,* 166 F.3d 1041, 1045 (9th Cir. 1999). The Act defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12111(8); *see also Sutton v. United Air Lines,* 527 U.S. 471, 477-78 (1999).

The USPS again asserts that Jackson has not and can not present a prima facie case. In his EEO complaints, Jackson frames his disability as atopic dermatology or discoloration of the skin, vocal cord abnormality restricting the range of his voice, until July of 1994 glaucoma and cataracts, and depression/anxiety disorder. (Coleman Dec. Exhs. B and C.) In his opposition papers, Jackson neither rebuts the USPS's assertion, nor presents any evidence tying his alleged disability to the adverse employment action. More importantly, Jackson

fails to put forth any evidence to demonstrate that he is in fact disabled under the Act. Jackson agreed in deposition testimony that he was only unable to work in the San Francisco under the direction of his supervisor. He further stated that he was not substantially limited from working in another office, in another capacity, or from working anywhere else within the legal department. (Coleman Rply Dec. Exh. A at 155). Jackson's admitted ability to work as an attorney in other offices or under different supervision confirms that he is not "substantially limited as to one or more of his major life activities." *See* 42 U.S.C. § 12111(8). Because the Court finds that Jackson is not disabled as a matter of law under the Rehabilitation Act, summary judgment is granted in favor of the USPS as to Jackson's disability claims.

(iv) Retaliation

Title VII prohibits employers from retaliating against employees in engaging in protected EEO activity. 42 U.S.C. § 2000e-3(a); *see also Washington v. Garrett*, 10 F.3d 1421, 1435 (9th Cir. 1994). To establish a prima facie case of retaliation, Jackson must show that: "(1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action; and (3) there is casual link between the protected activity and the adverse action." *EEOC v.*

Dinuba Med. Clinic, 222 F.3d 580, 586 (9th Cir. 2000) (internal quotation marks omitted).

The parties do not dispute that Jackson engaged in protected activities when he filed his complaints with the EEOC. The crux of the dispute is whether Jackson suffered cognizable adverse employment actions as a result of his participation in those activities. An employer's action rises to the level of an adverse employment action "if it is reasonably likely to deter employees from engaging in protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000).

Jackson contends that the USPS retaliated against him after he corresponded with an inspector for the EEOC.. What Jackson fails to recognize is that it was the substance of his correspondence alerting to the possibility of violence in the workplace, and not the fact that he engaged in correspondence with the EEOC or requested an investigation that lead to his placement on administrative leave and ultimate termination. (Complt. Exh. W.) Nevertheless, viewing the evidence in the light most favorable to Jackson, an argument could be made based on circumstantial evidence that there is a causal link between Jackson's correspondence and the adverse employment actions. As discussed above the USPS puts forth a

legitimate nondiscriminatory rationale for Jackson's termination (*see also* Complt. Exlt. X at 2), shifting the burden bask to Jackson to demonstrate that the reason given was merely pretextual for a discriminatory motive.. This burden Jackson does not meet. *See S.A. Empresa de Viacao Aerea Rio Grandeuse (Varig Airlines) v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir, 1982) (stating that "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda"). Jackson must set forth specific facts supported by admissible evidence, *i.e.*, affidavits or certified deposition testimony, showing that there is a genuine issue for trial. *See id.; see also Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (stating that it is not a district court's task to "scour the record in search of a genuine issue of triable fact"). Jackson presents no evidence that is sufficient to raise a genuine issue of material fact; his subjective belief that he suffered an adverse employment decision for discriminatory reasons is not sufficient to survive summary judgment. The Court accordingly grants summary judgment in favor of the USPS.

B. Jackson's Cross-Motion for Summary Judgment

In his cross-motion for summary judgment, Jackson asserts that he is entitled to summary judgment because he

has presented concrete evidence of disparate treatment and that the USPS's defenses have proven to be merely part of the discriminatory pattern. Jackson fails to go beyond the allegations in his complaint. Jackson alleges primarily that the USPS sees him as "flat black," as opposed to other African American attorneys described as "Black," and consequently the USPS sees "only his vices and not his virtues." Jackson does not state how this allegation demonstrates a disparate impact on African Americans in his office. "Under a disparate treatment theory, proof of an employer's intent to discriminate is an essential element of a plaintiffs prima facie case." *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 19.87); Jackson points to nothing in the record that raises a material issue conceming the USPS's alleged discriminatory intent. Jackson's motion does not establish that judgment as a matter of law in his favor is appropriate. An independent review of the record reveals that there is insufficient evidence to support Jackson's theory that the USPS's actions were motivated by Jackson's race, color or disability. Consequently, the Court denies Jackson's eross,-motion for summary judgment.

CONCLUSION

For the foregoing reasons, the USPS's motion for

summary judgment is GRANTED in its entirety. Jackson's cross-motion for summary judgment is DENIED in its entirety. Jackson's discrimination and retaliation claims are DENIED with prejudice.

IT IS SO ORDERED.

Dated: JUN 17 2003

S/_____
JEFFREY S. WHITE,
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES THOMAS JACKSON,
Plaintiff-Appellant,
v.
JOHN E. POTTER, Postmaster General; et al.,
Defendants-Appellees.

No. C 02-632 SBA
ORDER GRANTING DEFENDANT EEOC'S MOTION TO DISMISS; DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS; and CONTINUING CASE MANAGEMENT CONFERENCE

[Docket Nos. 8, 10]

Defendant's Counsel are directed to serve this order upon all other parties in this actions.

FILED
JUN 18 2002
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Plaintiff, Charles Thomas Jackson, is an African-American male attorney representing himself in propria persona. He brings the instant action against his former employer, the United States Postal Service ("USPS"), and the United States Equal Opportunity Commission ("EEOC") alleging claims for employment discrimination and

retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 791, et seq. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

The parties are presently before the Court on defendant EEOCs Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and plaintiff's Motion for Judgment on the Pleadings, or Alternatively, for Summary Judgment. Having read and considered the papers submitted, and being fully informed, the Court GRANTS the EEOC's motion to dismiss and DENIES plaintiff's motion in its entirety.[1]

BACKGROUND

Plaintiff graduated from Harvard Law School in 1973. He is not admitted to practice in the state of California and presently is an inactive member of the Ohio state bar. On September 4, 1984, plaintiff was hired by the USPS as Assistant Regional Counsel in San Bruno, California. In May 1994, plaintiff sought informal Equal Employment Opportunity ("EEO") counseling, claiming discrimination based on race (African-American), color (Black), age (47), and physical handicaps (atopic

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[1]The instant matter is suitable for disposition without a hearing. Fed. R. Civ. P. 78.

dermatology or discoloration of the skin, vocal cord abnormality restricting the range of his voice, glaucoma and cataracts). He later filed a formal complaint of discrimination on December 22, 1995. On May 22, 1996, plaintiff added a claim for retaliation to his complaint. On October 6, 1997, the USPS issued a final agency decision ("FAD") finding no merit to plaintiff's claims of discrimination and retaliation. Plaintiff appealed the FAD to the EEOC's Office of Federal Operations ("OFO") which affirmed the FAD on July 27, 2001.[2]

On February 22, 2002, plaintiff filed a lengthy Verified Employment Discrimination Complaint against the USPS and the EEOC.[3] He alleges that the USPS subjected him to discrimination and retaliated against him for his

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[2]Plaintiff also filed another complaint on March 30, 1999, alleging discrimination and retaliation. The EEOC later dismissed the complaint following plaintiff's commencement of this action, pursuant to 29 C.F.R. § 1614.107(a)(3) and 1614.109(b).

[3]Plaintiff's 26-page complaint contains 118 paragraphs and includes 42 exhibits. This pleading is not a model of clarity and it is questionable whether it is consistent with Federal Rule of Civil Procedure 8(a). Rule 8(a) requires only a "short and plain statement" for each claim, which means that plaintiff need only allege the basic facts which support that claim and the identification of the person or persons involved and his/her/their role in the claim. See McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996). It is not necessary to file a lengthy complaint containing voluminous attachments or superfluous facts which are not relevant to the specific claim being alleged. Id.

protected EEO activity. He also claims that the EEOC has improperly refused to compel the USPS to comply with Title VII and the Rehabilitation Act. The EEOC now moves to dismiss the Complaint under Rule 12(b)(6) and Rule 12(b)(1) In addition, plaintiff has filed a motion for judgment on the pleadings, or alternatively, for summary judgment, on the ground that the USPS's admissions in its Answer establish his right to a judgment on his claims as a matter of law. The Court discusses these motions in turn.

DISCUSSION

A. DEFENDANT EEOC'S MOTION TO DISMISS

1. Legal Standard

A Rule 12(b)(6) motion tests the legal sufficiency of a claim. Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997). The complaint is construed in a light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Everest and Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994). "Dismissal is

proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001).

2. Analysis

Plaintiff's dissatisfaction with the EEOC's handling of his complaints does not give rise to any cognizable legal claims against that agency. See Ward v. EEOC, 719 F.2d 311, 313 (9th Cir. 1983) (holding that third party employees could not state a claim under Title VI1 or the Administrative Procedures Act based on the EEOC's alleged negligence in processing plaintiff's complaints). Plaintiff attempts to distinguish Ward on the ground that he is seeking only equitable relief, as opposed to damages, with respect to the EEOC. Such a distinction, however is irrelevant, See id. Since there is no legal basis for pursuing any claims against the EEOC in this action, the Court grants the EEOC's motion to dismiss pursuant to Rule 12(b)(6).[4]

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[4]The Court notes that the EEOC also moves for dismissal under Rule 12(b)(1)for lack of jurisdiction. Generally, the Court would address jm'isdiction issues first, since the existence of subject matter jurisdiction is a threshold issue. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998). However, the EEOC's arguments for dismissal which are ostensibly based on lack of jurisdiction are more appropriately analyzed under Rule 12(b)(6), since they in actuality address the lack of

B. PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

1. Legal Standard

Federal Rule of Civil Procedure 12(c) authorizes a party to bring a motion for judgment on the pleadings. " A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." Fajardo v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999). "[A] plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). For purposes of such a motion, "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." Hal Roach Studios v. Richard Feiner and Co., 883 F.2d 1429, 1436 (9th Cir. 1989). The Court may not go beyond the face of the pleadings to resolve the

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merit with respect to plaintiff's Title VII and Rehabilitation Act claims.

motion without converting the motion to one for summary judgment. Id.[5]

2. Analysis

a. Discrimination on the Basis of Race, Color and Disability

Plaintiff's race and color discrimination claims under Title VII are premised on a theory of disparate treatment in the workplace. In order to establish these claims, plaintiff must establish that defendant "intended to discriminate against him . . . ." Jurado v. Eleven-Fifty Corp., 813 F 2d 1406, 1409 (9th Cir. 1987). "[A] plaintiff alleging disparate treatment under Title VII must first establish a prima facie case of discrimination" by showing that "(1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." Chuang v. University of Calif. Davis, Bd. of Trustees, 225 F.3d 1115, 1123 (9th Cir. 2000). Similarly, to present a prima facie case of disability

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[5]Motions for summary judgment are governed by Federal Rule of Civil Procedure 56(c), which states: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers or interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

discrimination under the Rehabilitation Act, a plaintiff must show that (1) he is disabled under the Act; (2) he is "otherwise qualified" for the position, with or without a reasonable accommodation; and (3) he suffered an adverse employment action because of his disability or was denied a reasonable accommodation. 29 C.F.R. § 1614.203(a); Zukle v. Regents of the Univ. of Calif., 166 F.3d 1041, 1045 (9th Cir. 1999).

If plaintiff is able to present a prima facie case of discrimination, "the burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action." Chuang, 225 F.3d at 1123. In the event the employer does so, "the plaintiff must show that the articulated reason is pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Id. (quoting in part Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

In his motion, plaintiff contends that the "facts admitted or deemed admitted by defendant are sufficient to establish [his] entitlement to all or part of the relief requested in the Complaint." (Pl.'s Mot. at 2.) The extent of plaintiff's argument is as follows:

> Defendant Postmaster General's Answer with Affirmative defenses admits the essential elements of plaintiff's causes of action for disparate treatment based on race, color and actual or perceived disability. Ans. ¶¶ 6-11, 15, 20, 21, 25, 26, 27, 28, 32, 34, 38, 39, 40, 44, 53, 54, 55, 59, 60, 76 [footnote omitted], 78, 79, 82, 83, 85, 87, 89, 93, 93, 96, 97, 101,102, 104.

(Pl.'s Mot. at 3.) Aside from this conclusory statement, plaintiff fails to cite any legal authority or provide any reasoned analysis to establish the legal merit of his claims. Moreover, the Court has reviewed each of these allegations and, applying the legal standards articulated above, finds that they are insufficient to entitle him to judgment as a matter of law on his Title VII and Rehabilitation Act claims. Therefore, plaintiff's motion for judgment on those claims is denied.

b. Retaliation

Title VII prohibits employers from retaliating against employees for engagmg m protected EEO activity. 42 U.S.C. § 2000e-3(a); Washington v. Garrett, 10 F.3d 1421, 1435 (9th Cir. 1994). To establish a prima facie case of retaliation, a plaintiff must show that "(1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected activity and the adverse action." EEOC v.

Dinuba Med. Clinic, 222 F.3d 580, 586 (9th Cir. 2000) (internal quotation marks omitted).

As above, plaintiff contends that he is entitled to judgment based on the USPS' admission to paragraph 75 of the Complaint. (Pl.'s Mot. at 2.) Paragraph 75 states as follows:

> 75. When plaintiff arrived at work on June 11, 1999, he was met by Postal Inspector Thomas D. Brasher, who interviewed plaintiff regarding the substance of the latter's e-mail transmittals. Inspector Brasher then ushered plaintiff into the office of Mr. Burroughs, who presented plaintiff with a memorandum, dated June 10, 1999, placing the latter on enforced leave and ordering him to undergo a fitness-for-duty examination. A true copy of that memorandum is attached hereto as Exhibit W. Inspector Brasher then allowed plaintiff to gather what he could carry and escorted him to his car, with orders not to return without permission.

(Compl. 75.)[6] Plaintiff fails to explain how the above allegations demonstrate, as a matter of law, the USPS' liability on his claims of retaliation. In any event, it is readily apparent

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[6]Exhibit W is an internal memo from James D. Burroughs, Managing Counsel. Mr. Burroughs states in the memo that his review of communications sent by plaintiff to other USPS staff "lead[s] me to conclude that there exists the potential that you may pose a significant risk of physical harm to me and others, and to yourself." (Compl. Ex. W at 1.) The memo further informs plaintiff that he is being referred for a medical evaluation and being placed on paid administrative leave pending the evaluation. Id.

that the foregoing allegations alone are insufficient to establish a prima facie case of retaliation. Plaintiff s motion for judgment on the pleadings with regard to his retaliation claim is denied.

c. Involuntary Servitude

Plaintiff alleges a claim under the Thirteenth Amendment, which prohibits "involuntary servitude enforced by the use or threatened use of physical or legal coercion." United States v. Kozminski, 487 U.S. 931, 944 (1988). Plaintiff's motion for judgment with respect to this claim is frivolous because Title VII is the exclusive remedy for federal employee discrimination claims. See Vinieratos v. United States, 939 F.2d 762, 773 (9th Cir. 1991). Moreover, there is no factual basis in the Complaint to support this claim, given that he was free to terminate his employment. See International Union, U.A.W.A., A.F. of L., Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 251 (1949) ("[w]here an employee has the ability to terminate his employment relationship, a claim of involuntary servitude does not lie under the Thirteenth Amendment."), overruled on other grounds by, Lodge 76, International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n., 427 U.S 132 (1976). Plaintiff's motion as it pertains to this

claim is denied.

CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED THAT:

1. Defendant EEOC's motion to dismiss [Docket No. 8] is GRANTED. All claims alleged against the EEOC are DISMISSED WITH PREJUDICE.

2. Plaintiff's motion for judgment on the pleadings [Docket No. 10] is DENIED.

3. The Case Management Conference scheduled to follow the hearing on the instant motion is CONTINUED to July 17, 2002 at 3:30 p.m. The parties shall file a joint CMC statement at least ten (10) days prior to the conference. Plaintiff is to set up the conference call with all the parties on the line and call chambers at (510) 637-3559 at the time designated above. NO PARTY SHALL CONTACT CHAMBERS DIRECTLY WITHOUT PRIOR AUTHORIZATION OF THE COURT.

IT IS SO ORDERED.

Dated: June 17, 2002

S/_____
SAUNDRA BROWN ARMSTRONG,
UNnited States District Judge

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Charles T. Jackson,
Complainant
v.
John E. Potter,
Postmaster General,
United States Postal Service
(Pacific Area),
Agency

Appeal No. 01980503
Agency No. HO-0035-95

DECISION

Complainant timely initiated an appeal from a final agency decision (FAD) concerning his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.; and the Section 501 of the Rehabilitation Act of 1973[1] (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The appeal is accepted pursuant to 29 C.F.R. § 1614.405. Complainant alleged that he was discriminated against on the bases of race (African-American), color (black), age

[1]The Rehabilitation Act was amended in 1992 to apply the standards in the Americans with Disabilities Act (ADA) to complaints of discrimination by federal employees or applicants for employment.

(47), disability (atopic dermatology, vocal cord abnormality, glaucoma and cataracts) and reprisal (prior EEO activity under Title VII) when: (1) on August 31, 1995, he was badgered, insulted and ultimately removed from a Board of Contract Appeals (BCA) assignment; (2) on September 21, 1995, he was denied a training request; (3) his Attorney Compensation System (ACS) evaluations were inherently discriminatory, resulting in less pay than coworkers with similar agency experience; (4) he was not given appropriate recognition for innovation and application of computer technology in the November, 1995, issue of PASSWORD. For the following reasons, the FAD is AFFIRMED.

The record reveals that during the relevant time, complainant was employed as an Attorney in the Law Department at the agency's San Francisco, California, facility. Regarding (1), the record indicates that complainant was assigned an appeal before the BCA with the proviso that he coordinate every aspect of the appeal with the Acting Deputy Field Counsel (ADFC). However, management averred that complainant failed to consult with the ADFC prior to communicating with opposing counsel and, as a result, mishandled the case. While the agency maintained that complainant then asked to be relieved of his assignment to the appeal, complainant contended that he requested to be removed because of the restrictions placed on his handling of the appeal, including the requirement that he coordinate with the ADFC. Regarding (2), complainant alleged that all younger, non-minority attorneys without impairments were provided training and legal education under the Legal Services Strategic Plan, while he was denied the training opportunities he applied for. Regarding (3), complainant contended that at least two similarly situated agency attorneys were paid more than he, despite having similar

responsibilities and agency experience. Finally, regarding (4), complainant contended that he was not given appropriate recognition for innovations and applications of computer technology in his performance appraisals. Believing he was a victim of discrimination, complainant sought EEO counseling and subsequently filed a formal complaint on December 22, 1995. At the conclusion of the investigation, complainant was informed of his right to request a hearing before an EEOC Administrative Judge or alternatively, to receive a final decision by the agency. Complainant requested that the agency issue a FAD.

In its FAD, the agency found that complainant failed to establish that any impairment he suffered from substantially limited any of his major life activities. In so finding, the FAD noted complainant's own statements which noted that his impairments were not substantially limiting, and further found that he was never perceived by his employers as having a disability.

As to discrimination on the remaining bases and reprisal, the agency found that, regarding (1), complainant failed to establish a *prima facie* case of discrimination or reprisal. The FAD found that as complainant asked to be taken off the appeal at issue, he failed to establish how he was harmed or adversely affected by the agency's actions. The FAD also found that complainant failed to establish that any similarly situated employees not in his protected classes were treated differently. In any event, the FAD found that complainant failed to demonstrate as pretextual the agency's legitimate, nondiscriminatory reasons for its actions, namely, that the agency relieved complainant of his assignment to the appeal upon his request because he did not want to follow the terms agreed upon for his handling of a BCA appeal. The FAD also found that complainant failed to establish a *prima facie* of retaliation, as there is no

evidence that complainant removed himself from the BCA appeal at issue due to his prior EEO activity.

Regarding (2), the FAD found that complainant failed to establish a *prima facie* case of discrimination or retaliation when the agency denied his requests to take various legal courses, as he failed to identify similarly situated employees not in his protected groups who were treated differently. In so finding, the FAD noted that while complainant did not receive approval for all the training courses he applied for, management offered him other courses to take, which he refused. In addition, the FAD found that complainant failed to establish a *prima facie* case of retaliation, as he did not demonstrate that he was adversely affected by the denial of training and as he failed to establish a nexus between his EEO activity in May of 1994 and his denial of training in September of 1995.

Regarding (3), the FAD found that complainant failed to establish a *prima facie* case of discrimination on any basis, as he failed to identify similarly situated employees not in his protected groups who were treated differently. The FAD found that assuming, *arguendo*, complainant had established a *prima facie* case, the agency articulated a legitimate, nondiscriminatory reason for its action, namely, that complainant was not compensated as were other staff attorneys due to his inability to perform certain types of functions which required litigation skills and as he had not performed as well as other staff attorneys. Finally, the FAD found that complainant failed to establish that the agency's articulated reasons were more likely than not a pretext for discrimination.

Regarding (4), the FAD found that complainant failed to establish a *prima facie* case of race, color and age discrimination, as he failed to identify similarly situated

employees not in his protected groups who were treated differently, and as he failed to demonstrate how he was harmed when he was not recognized in the newsletter at issue. In addition, the FAD found that complainant failed to establish a *prima facie* case of retaliation, as he failed to establish that agency officials were aware of his prior EEO activity. In any event, the FAD found that the agency articulated legitimate, nondiscriminatory reasons for its actions, namely, that the newsletter at issue was created and distributed by User Support, a contractor which supplied computer assistance to the Law Department.

On appeal, complainant contends that the FAD erred in finding that he was not discriminated against, and that the agency refused to consider evidence sufficient to determine the accuracy of his allegations. The agency requests that we affirm its FAD.

Regarding (1), we disagree with the FAD's finding that, because complainant requested that he be taken off the BCA case, he was not harmed or adversely affected by an agency action. A review of the record establishes that complainant is challenging the multiple restrictions placed on his handling of cases before the BCA, restrictions which he claimed were unwarranted and which resulted in his request to be removed. Thus, we find that complainant has alleged that he was subject to an adverse agency action. However, we find that the record establishes that the agency articulated a legitimate, nondiscriminatory reason for its actions, i.e. complainant's prior performance when handling BCA cases. We further find that complainant failed to establish that the articulated reason was a mere pretext designed to mask a discriminatory or retaliatory animus.

Regarding (2), we disagree with the FAD's finding that

complainant failed to establish a *prima facie* case of discrimination or retaliation when the agency denied his requests to take various legal courses. The record establishes that there were several similarly situated employees not in complainant's protected groups who were approved to take training courses while complainant's requests were denied. However, the Commission finds that the agency articulated legitimate, nondiscriminatory reasons for its actions regarding the particular training courses at issue. For example, we note that complainant's supervisors stated that complainant's request to attend the Postal Contracting training course on September 21, 1995 was denied as that course was too basic in nature for someone with complainant's experience, but complainant was offered several other alternative courses in the area of contracts which his supervisors believed would prove more beneficial to him. Investigative File, at Affidavits B, D. After consideration of the record, we find that complainant has failed to establish that it was more likely than not that the agency's articulated reasons for denying the particular training courses at issue were a pretext for discrimination. In addition, the Commission notes that the FAD appears to have compressed complainant's contentions regarding training with a similar contention regarding alleged denials of details. However, after careful consideration of the record, we find no evidence of discriminatory animus regarding the alleged denial of complainant's detail request. Investigative File, at Affidavit B.

Regarding (3), the Commission disagrees with the FAD's finding that complainant failed to establish a *prima facie* case of discrimination on any basis or retaliation, as he did identify similarly situated attorneys not in his protected groups who received greater compensation than he under the ACS. The record indicates that under the ACS, an attorney's salary may be adjusted each year, with larger

adjustments granted to those attorneys whose performance under the guidelines resulted in a higher "expected value" to the agency for the upcoming year. Accordingly, the salaries of those attorneys receiving higher evaluations increased at greater levels each year than those receiving lower evaluations. However, we find that the agency articulated legitimate, nondiscriminatory reasons for its actions in compensating complainant at lower levels than comparison employees with similar tenure and experience. Because the comparison employees cited by complainant had received higher ACS evaluations than complainant over the course of many years beginning in 1988, they received corresponding higher salary adjustments each year, resulting in a large discrepancy by the time in question. We note that complainant's ACS evaluations articulated the reasons for the appraisals and that such evaluations were reviewed with the individual attorneys by their managers. One of complainant's supervisors detailed several critical legal errors made by complainant over the course of one year as an example of the reason his ACS evaluations had not been as high as other attorneys under his direction. Investigative File at Affidavit F. The Commission finds that complainant has failed to establish that the agency's articulated reasons were more likely than not a pretext for discrimination or retaliation.

In addition, regarding (4), we find that complainant's contention can be fairly read to be that the agency did not recognize his contributions in the area of computer technology when completing his ACS evaluation in 1995. As such, we find that the FAD erred in failing to consider this contention within the context of his contention that his ACS evaluation was discriminatory. However, the Commission finds that the a review of the record establishes that the relevant agency officials articulated legitimate, nondiscriminatory reasons for this action.

Specifically, we note the testimony of complainant's supervisor, who stated that although she recognized complainant's computer work, he was evaluated and rated based on his work as an attorney. Investigative File, at Affidavit B. Further, complainant's supervisor stated that her position involved evaluating and rating the work of attorneys, and as such she made no contribution to the agency's newsletter "PASSWORD," which was distributed by a contractor which supplied computer assistance to the agency's legal department. After a review of the record, we find that complainant has failed to meet his burden in establishing that the agency's articulated reasons for its actions were a pretext for discrimination or retaliation.

Finally, we note that complainant alleged that he was discriminated against due to his disabilities, particularly the impairments of atopic dermatitis and a vocal abnormality, which complainant states causes his "face and voice [to be] subjectively ugly." As we have found that the agency articulated legitimate, nondiscriminatory reasons for its actions and complainant failed to meet his burden to establish that it was more likely than not that the agency's articulated reasons were pretextual, we need not determine whether complainant was in fact substantially limited in the performance of any major life activity or whether agency officials perceived him as an individual with a disability as defined in the applicable regulations.

Therefore, after a careful review of the record, including complainant's contentions on appeal, the agency's response, and arguments and evidence not specifically addressed in this decision, we AFFIRM the FAD.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0701)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the

deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0900)

You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VIIof the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

S/_____
Carlton M. Hadden, Director
Office of Federal Operations

July 27, 2001

_____
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

JUL 27, 2001

_____
Date

S/ JR Byrdl
Equal Opportunity Assistant

UNITED STATES POSTAL SERVICE
EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT IN
THE MATTER OF:

Charles T. Jackson,
Complainant,
v.
Marvin Runyon,
Postmaster General,

Agency Case No. HO-0035-95
Filed on: December 22, 1995
Certified No Z 258 304 503

FINAL AGENCY DECISION

This is the final agency decision of the US Postal Service (hereinafter referred to as the Agency) in the above captioned case.

Complainant alleges he was discriminated against because of his race (African-American), color (Black), age (47) and physical handicaps (atopic dermatology or discoloration of the skin; vocal cord abnormality restricting the range of his voice, and; until July qf 1994, glaucoma and cataracts) in that: (1) on August 31. 1995, he was badgered, insulted and removed from a Board of Contract Appeals (BCA) assignment; (2) on September 21, 1995, he wes denied a traimng request; (3) his Attorney Compensation System (ACS) evaluations are inherently discriminatory toward him as they were highly weighted towards advocacy as opposed to a broader application of duties that he performed, and; (4) he was noi given appropriate recognition for innovation and application of computer technology in the November t995, issue of PASSWORD.

Complainant has cited the following officials as responsible for the alleged acts of discrimination.

1	William Bennett	Associate General Counsel
2	Perry Johnson	Chief Field Counsel
2	Doris Godinez-Phillips	Deputy Chief Counsel
3.	Charles Kappler	Deputy General Counsel
4	Mary Elcano	General Counsel

CASE CHRONOLOGY

These complaints were processed in accordance with Equal Employment Opportunity Commission complaint-processing regulahons (29 C.F.R. 1614).

Complainant first sought EEO counseling on May 18. 1994, on issues Number 3 and 4. After meeting with Ihe EEO counselor, Complainant was given his final interview by letter dated October 24 ,1994. The issues brought to the attention of the EEO counselor were best identilied in Ccmpiainam's initial submission of PS Form 2564-A to the EEO counselor received on May 18. 1994. Complainant stated that "[O]n October 1. 1937 and continuously Ihereafier . . . Officials responsible for administering the Attorney Compensation System did so in such a manner as to dlscdminste against requester on the basis of his race. color, age. and physical handicap." Complainant at the time identified the issues in the form of the comparative employees cited and how they were treated differently than himself. He indicated on PS Form 2564-A that the empicyees treated differently were:

1. All non minority attorneys without requesters age status & physical handicaps w[ere] treated differently than I when they were evaluated under the Attorney

Compensation System (ACS). All such attorneys were evaluated on the basis of factors identified in the appraisal of performance form. Requester has been evaluated on the basis of inaccurate, unconfirmed and/or exaggerated reports of purported errors and differences of opinion, with little or no regard to the factors so identified.

2. All non-minority attorneys without requesters age status & physical handicaps w[ere] treated differently than I when they were paid under the ACS. Although requester has demonstrably carried the highest numerical advice and litigation caseload of all the attorneys in the Pacific Area Office since the ACS has been in effect, he receives the lowest attorney salary in the Office.

3 All non minority attorneys without requesters age status & physical handicaps w[ere] treated differently than I when they were provided training & legal education ander the Legal Services Strategic Plan. Officials responsible for administering the ACS have provided training and continuing legal education opportunities to such attomeys by paying their tuition to courses necessary to maintain their eligibility to practice law (when such courses have been of '[particular interest]' to the Postal Service.' Requester has also received in office orientation to fewer new areas of law than such attorneys and received the benefit of significantly fewer training dollars than such training."

In essence, the two issues brought to the attention of the EEO counselor were that Complainant was: (1) bemg paid a lower salary than other attorneys because of the way the ACS was administered, and; (2) not provided training and legal education.

The resolution Complainant sought was an "Increase in salary

to the Law Department average for non-minority attorneys without requester's age status and physical handicaps, retroactive to the inception of the ACS."

Complainant thereafter filed a formal complaint of discrimination dated November 9, 1994. On September 5, 1995, he again sought EEO counseling of issues Number 1 and 2 noted above. After meetings with the EEO counselor, Complainant was issued a Notice of Final Interview on December 22, 1995, and Issues Number 1 and 2 were incorporated with Issues Number 3 and 4.

Thereafter the complaint was investigated, and the investigative file and appeal rights were transmitted to Complainant. The appeal rights provided Complainant the option either to request an oral hearing by an EEOC administrative judge or, in the alternative, a final agency decision without a heating. Complainant requested a final agency decision without a hearing.

DISCRIMINATION ISSUE

In McDonnell-Douglas Corp. v. Green, 411 U. S. 792 (1973), the Supreme Court set forth the basic allocation of the burden and order of proof in a Title VII case. See also Texas Decertment of Community Affairs v. Burdine, U.S. 248 (1981). Under the McDonnell-Douglas and Burdine coostructions, a three-step process is involved in a disparate treatment case, the first step of which is for the Complainant to establish a prima facie case of discrimination. He may do this by showing that he is a member of a protected group, that he sought an available promotion for which he was qualified, that he was not selected for that position, and that another employee not of his protected group was selected. See McDonnell-Douglas, supra, at 802. This prima facie case rests on the

assumption that fulfilling its requirements establishes facts from which an inference can be drawn that, if the employer's actions remain unexplained, " . . . it is more likely than not that such actions were based on a discriminatory criterion illegal under the act." Furnco Construction Co. v. Waters, 438 U.S. 567 (1978).

If the Complainant has been successful in establishing a *prima facie* case, the employer must then, " . . . articulate a legitimate nondiscriminatory reason . . . " for the employment decision. The employer need demonstrate only that a genuine issue of fact is raised by the evidence as to its action in order to meet its burden of going forward with the evidence. See Furnco supra; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). Having done so, the burden shifts back to the Complainant to prove by a preponderance of the evidence that the employer's reason was a pretext for intentional discrimination. McDonnell-Douglas, supra at 802-804, Burdine, supra, at 252-253; United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). To meet that burden, a Complainant must show that the employer did not rely on its proffered reason or that the proffered reason is not worthy of belief. In sum, proof of discriminatory motive is critical in a disparate treatment case, International Brotherhood of Teamsters v. United States, 431 U.S. 324, at 325 (1977), and the burden of proof remains at all times with the Complainant. Burdine, supra and Aikins, supra.

While the McDonnell-Douglas standard of shifting the burden to go forward also applies to cases where alleged discrimination is based on handicap, there are special elements to be considered in these cases brought under the Rehabilitation Act of 1973, 29 U.S.C. Section 794 et seq. These elements were set out in Pushkin v. Regents of the University of Colorado, 658 F. 2d 1372 (1981), based on

the Supreme Court's opinion in Southeastern College v. Davis, 442 U.S. 397 (1979). In order to establish a prima facie . case of discrimination, Complainant must show that he/she was a "Qualified Handicapped Person" aside from his/her handicap, and an action was taken giving rise to the inference that the action was based solely on the handicap. The burden then shifts to the employer to show that Complainant was not an "Otherwise Qualified Person", i.e., one able to meet all the program's requirements in spite of the handicapping condition, or was rejected for reasons other than the handicap. Complainant must then go forward with evidence to show that the employer's reasons for alleged discrimination were misconceptions of unfounded factual considerations, or non-legitimate program requirements, or that the employer articulated reasons for their actions encompassing unjustified considerations of the handicap itself.

Age discrimination, as defined by the Age Discrimination in Employment Act (ADEA), is treated differently than other types of discrimination covered by Title VII of the Civil Rights Act of 1964. Courts have consistentiy held that it is inappropriate, given the difference in the types of discrimination covered by the two statutes and the Congress' choice te enact separate legislation to deal with age discrimination, to adopt Title VII principles in a wholesale manner in age disodminefion cases. See Lorillard v. Pons, 424 U.S. 575 (1978); Laugeson v. Anaconda Co., 650 F.2d 64 (5th Cir. 1981). Nevertheless, courts have found it convenient to apply the Title VII order and allocation of proof guidelines enunciated in McDonnell-Douglas Corp. v. Green, and Texas Department of Community Affairs v. Burdine in age discrimination cases, with a significant additional factor. See Jaekson v Sears, Roebuck and Co., 648 F.2d 225, 230 (5th Cir. 1981); Sutton v. Arco, 646 F.2d 407, 411 (9th Cir. 1981)

and Kentroti v. Frontier Airlines, 646 F.2d 967 (10th Cir. 1978).

The significant additional factor to the McDonnell-Douglas guidelines is the requirement that the Complainant prove that age was a determinative factor in the action or personnel action at issue in order to establish a *prima facie* case. Loeb v. Textron, 600 F.2d 1003, 1004-1015 (1st Cir. 1979). The employer's burden to articulate a nondiscriminatory reason for its actions and the Complainant's burden to prove pretext are the same as in a Title VII case, as is the Complainant's ultimate burden to prove intentioonal discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

The burden of proof considerations set down in McDonnell-Douglas Corp. v. Green also apply to retaliation cases. Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 545 F. 2d 22 (1976), provides general guidelines in establishing a *prima facie* case of retaliation. It must be shown that the Complainant engaged in a protected activity; (2) that the employer was aware of the protected activity; (3) that the Complainant subsequently was adversely affected by an action of the employer; and (4) that the action in question followed this protected activity within such a period of time that a retaliatory, motivation may be inferred. These are the general considerations bearing on the analysis of these particular charges to determine if the facts warrant findings of reprisal.

BACKGROUND

During the period of time that the alleged incidents took place, Complainant was an Attorney, grade level Attorney

Compensation System (ACS), employed within the Law Department in San Francisco, CA (IF, AFF. A1).[1] Doris Godinez-Phillips, Deputy Chief Field Counsel. had been Complainant's immediate supervisor since June 29, 1991. Prior to that date Mr. William A. Campbell had been Complainant's immediate supervisor beginning during the month of May 1988 (IF, B1 pg. 5) M. Perry Johnson, who was the Deputy General Counsel, a position he held since July 11 1988, was Ms Godinez-Phillips immediate supervisor and together they had been responsible for evaluating Complainant's perfomance since August 21, 1992. (IF, AFF. D pg. 3). From October 31, 1992 onward, Charles Kappler was appointed to the position of Deputy General Counsel and therefore was the immediate superior of M. Perry Johnson and Doris Godinez-Phillips. Mr. Kappler testified that prior to October 31, 1992 he did not have a working relationship with the Complainant. As Deputy General Counsel he was not directly responsible for appraising Complainant's performance. (IF, AFF. C pg. 2). Testimony revealed that the Complainant was evaluated every fiscal year under the Attorney Compensation System (ACS), which included the following criteria:

Client - Manager Assessment
Work Load and Level of Work
Professional Knowledge and Judgment
Research and Analysis
Writing
Reliability and Timeliness
Initiative
Creativity
Advocacy Skills

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[1]Hereinafter. Agency Investigative File will be designated (IF), Affidavit (AFF.), Exhibit (Exh.), and Page (pg.).

Affitude
Extra Responsibilities During Evaluation Period, (IF, AFF. C pg. 6 & AFF. D pg. 7)

The ACS guidelines had been in place since October 1987. The ACS program focused on each attorney's expected value to the Postal Service for the coming year. Appraisals were to be reviewed with the individual attorneys by their immediate managers. Salary adjustments were based on a documented appraisal of performance on factors identified on the Appraisal Performance Form . The guidelines required awards to be geared to the value of "exceptional" or "extra" performance and to the level expected of other attorneys of similar ability. (IF, Exhs. 14, 15)

ISSUE NUMBER 1

Was Complainant Discriminated Against Due To His Race, Color, Age, Physical Handicap and/or in Retaliation For His EEO Activity When He Was Allegedly Badgered, Insulted And Removed From The Bollschweiler BCA Appeal On August 31, 1995?

The record file reveals that prior to August 9, 1995, Complainant had been assigned an appeal (Bollschweiler) before the Board of Contract Appeals (BCA). (IF, AFFs., A1 & B1; Exhs. 16, 17, 18, & 21)[2] Doris Godinez-Phillips

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[2]Complainant submitted two affidavits. The first one (Affidavit A) was submitted on April 7, 1995, and the second one (Affidavit Al) was submitted on January 15, 1996.

Affidavit B1 refers to Doris Godinez-Phillips' undated supplemental affidavit consisting of 27 pages which was ostensibly submitted after Ms. Godinez initial affidavit (G) dated September 21, 1995. There is another Affidavit B in the file which was submitted by Mary Elcano, General

explained the circumstances which existed at the time Complainant was assigned responsibility for the Bollschweiler Appeal and how it was assigned to Complainant by the Acting Deputy Field Counsel Elena Alejandre who had been covering the position for her when the Complainant was assigned the appeal. Ms. Godinez-Phillips explained how Ms. Alejandre had not been aware that Complainant had not handled a BCA assignment in years and did not have the experience to handle the assigned case absent supervision by an attorney with more subject matter experience. Rather than take Complainant off the Appeal, they agreed to allow Complainant to continue on the appeal provided he coordinate every aspect of the appeal with Ms. Alejandre and that no documents and/or communications should go out without first having been reviewad by Ms. Alejandre. (IF, AFF. B pgs., I & 2). Ms. Godinez-Phillips stated that Complainant was questioned about the Boltschweiler (BCA) appeal because he violated the conditions set forth by Ms. Alejandre (and approved by Ms. Godinez-Phillips) by engaging in both verbal and written communications with opposing counsel without first consulting with Ms. Alejandre. Consequently, as Ms. Godinez-Phillips had feared, the Complanant mishandled the case when he failed to consult with Ms. Alejandre prior to communicating with opposing counsel concerning the case at issue and made incorrect averments concerning his ability to settle the case. (IF, AFF. BI pgs 2 - 5). Ms. Godinez-Phillips went on to explain that Complainant's shortcomings, as they related to handling BCA appeals, had predated her tenure as Deputy Field Counsel. She noted that it had been her predecessor, William A. Campbell, who recognized that Complainant had not been able to handle such cases without his direct

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Counsel, dated October 11, 1995.

supervision. (IF, AFF. B1 pgs. 5 & 6).

Ms. Godinez-Phillips explained that Complainant did not wish to be supervised in the manner proposed and that he had conveyed to her that:

> "...It]he extent of supervision you propose has connotations more punitive than remedial; and I suspect that, by agreeing to it, I would be subjecting us both (not to mention Elena) to an unnecessrily stressful, and ultimately frostrating, experience. I must therefore decline your proposed handling of this case and invite you to substitute other counsel in my stead." (IF, AFF. B1 pg. 3).

Doris Godinez-Phillips stated that Complainant was relieved of his assignment to the Bollschweiler appeal as a result of the above noted request. (Ibid).

Ms. Godinez-Phillips testified that Complainant was not assigned specific legal matters, such as BCA appeals, due to his lack of judgment in handling such matters. She added that to the best of her knowledge, the practice of not assigning Complainant BCA appeals was initiated between Complainant and his former immediate supervisor, William Campbell, a practice she continued. (IF, AFF. B1 pg 16; Exh. 17). Ms. Godinez-Phillips stated:

> "1 believe, based on my conversations with Mr-Campbell, that this arrangement was made due to Complainant's exhibited poor litigation skills, his lack of judgment in handling certain matters, and his resultant desire not to litigate cases until his litigation skills had improved considerably. Indeed, I have been made aware that one administrative judge commented something to the effect that

> Complainant's performance at hearing was the worst he had ever seen." (Ibid).

COMPLAINANT HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF RACE, COLOR, DISABILITY AND AGE, DISCRIMINATION.

Complainant has failed to meet several elements of a prima facie case as it relates to this issue. Although Complainant refers to being taken off the Bollschweiler BCA appeal by Ms. Godinez-Phillips, (IF, AFF. A1) the record file and testimony indicates Complainant asked to be taken off the case and that another attorney be assigned to handle it. This is exactly what was done in this case. (IF, AFF. B1; Exhs. 16, 17, 18, pg 2).

As a result, Complainant fails to establish how he was harmed or adversely affected by the agency's actions. Also, Complainant failed to identify a similarly situated employee who was treated differently. In fact, Complainant acknowledges this by virtue of his own statement where he states:

> "I am not aware of any similarly-situated attorney who has been treated with as much contempt by Ms. Godinez-Phillips, with the possible exception of Harold E. Durham (European American/white/[age not applicable]/no disabilities), attorney, now at Postal Service Headquarters."

(IF, AFF. A1) In other words, Complainant is not sure if he could identify Mr. Durham as a similarly situated employee who was treated differently. Furthermore, Complainant does not attempt to explain how Mr. Durham was similarly situated and how he was treated differently. What he does appear to infer is that Mr. Durham, who is of a different

race and age, was treated the same as he. As a result, the circumstances surrounding Complainant's comparison employee, Mr. Durham, do not establish a set of circumstances which if left unrebutted would create the inference that Complainant was discriminated against based on his race, color, disability, and age and/or retaliated against based on his prior EEO activity.

Complainant also named M. Perry Johnson, Chief Field Counsel, San Francisco Office. as a similarly situated employee who was treated differently because he "...has received no criticism of such caliber from his supervisors, despite having unequivocally caused more damage to the Postal Service by his approval of the firing of Beverly Hills (90210) Postmaster Koula Fuller alone than I have been accused of causing by the sum total of all the alleged errors for which I have been held arguably responsible during my entire postal career." (IF, AFF. A1 pg. 1).

Complainant again fails to establish a similarly situated employee who was treated differently. Complainant has failed to explain and establish how the alleged circumstances surrounding the Beverly Hills Postmaster were similar to the circumstances surrounding his assignment and handling of the BCA Bollschweiler appeal. Furthermore, it is clear that M. Perry Johnson, who as Chief Field Counsel is an executive and is not similarly situated to Complainant by virtue of the positions they hold and their reporting relationships. Complainant's immediate supervisor, for example, was Ms Godinez-Phillips. M. Perry Johnson was Ms. Godinez-Phillips' immediate supervisor. As a result, the only official who could have made any decisions regarding M. Perry Johnson's performance would have had to have been his immediate supervisor who was not Ms. Godinez-Phillips. There simply was no way for Ms Godinez-Phillips to have treated Complainant differently

than M. Perry Johnson, her superior.

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION.[3]

In regard to his physical limitations Complainant stated:

> "My atopic dermatitis and vocal abnormality do not limit my ability to perform the duties of the postal position to which I have been assigned, except to the extent they render my face and voice subjectively ugly, and thereby limit my ability to elicit the respect and fellow feeling of the people with whom I must interact."

(IF, AFF. A) Being subjectively ugly is not an impairment which substantially limits a major life activity. Complainant fails to establish that he suffers from a disability in the form of atopic dermatitis and voice abnormality.

Complainant went on to state regarding another physical limitation:

> "My cataract (right eye until recent surgery) and glaucoma (both eyes, nerve damage only to left) have affected my ability to perform the duties of my postal position only to the extent of contributing to an occasional typographical error."

(Ibid). Based on Complainant's own statement, the physical limitations to Complainant's eyes could also not be determined to be an impairment which substantially limits

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[3]Based on this analysis Complainant fails to establish he is a handicapped employee as it retates to the other issues included in this FAD.

a major life activity.

In his affidavit dated April 7, 1995, Complainant infers the reasonable accommodation theory. He states on page 1:

> "All my disabilities were disclosed in my pre-employment physical. Because the effect of my disabilities on my ability to perform the duties of my postal position depends primarily on the subjective reactions of other people to me, the only accommodation necessary is for the Law Department administrators to try ignore them."

(Ibid). All of the agency officials named by Complainant as responsible officials testified they never perceived Complainant as suffering from a disability. Furthermore, Complainant has not established thai he was perceived by his employer to suffer from an impairment which substantially limited a major life activity. (IF, AFFs. A & Al).

In this regard Complainant has failed to establish that he is a disabled employee in that he cannot establish that he suffers (or is perceived of suffering) from an impairment which substantially limits a maior life activity.[4]

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE OF RETALIATION.

As noted previously, Complainant has not been able to establish he was harmed or subjected to an adverse action when he volunteered to remove himself from the BCA Bollschweiler appeal by letter dated August 23, 1995.

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[4]Complainant can not, as a result, establish a prima facie case of disability discrimination as it relates to the rest of the issues in this complaint.

Furthermore, Complainant himself is not sure whether his prior EEO activity was the reason he chose to remove himself from the BCA appeal. Complainant stated in this regard:

"I can only speculate as to whether retaliatory motives have been involved." (IF, AFF. A1).

The record file also revealed that Complainant did not establish that he had participated in EEO activity prior to August 23, 1995, nor did he establish that the alleged responsible officials were aware of any EEO activity in which he may have participated. (Ibid)

Based on the above, Complainant has not presented a set of facts which if left unrebutted woud create the inference that he removed himself from the BCA Bollschweiler appeal because of his prior EEO activity.

COMPLAINANT HAS FAILED TO REBUT THE AGENCY'S ARTICULATED LEGITIMATE NONDISCRIMINATORY REASONS FOR ITS ACTIONS.

Assuming arguendo that Complainant has established a prima facie case of race, color, disability, age discrimination and/or retaliation, management would have the obligation of articulating some non-discriminatory rationale for its actions. Furnco Construction Corp v. Waters, 438 U.S. 567 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). "Articulation" of a legitimate reasom, in this sense, is the mere statement, supported by some evidenoe, that management had a non-discriminatory basis for its action(s) affecting the Complainant. This will result in a finding of no discrimination unless the reasons given are shown to be mere pretext for discrimination. The final burden is on the

Complainant to demonstrate that the reasons given by management for its actions are pretextual. This burden may be met by direct evidence of discriminatory intent or by indirect evidence of past practices.

Management's position is articulated by Ms. Doris Godinez-Phillips who stated that Complainant asked to be relieved of his assignment to the Bollscweiler appeal because be did not wish to live up to the terms agreed upon under which he would be allowed to handle an appeal to the BCA. Complainant violated the terms of the agreement and when notified that the terms would be enforced, due to his lack of experience in handling those types of appeals, chose not to continue in hfs assignment of tbe Bollschweiler appeal. (IF, AFF. B1). Ms. Godinez-Phillips added that Complainant's inability to adequately handle BCA appeals predated her tenure as Complainant's supervisor. (IF, AFF. B1 pgs 5 & 6).

Complainant's own formal complaint statement of November 9, 1994, confirms Ms. Godinez-Phillips' contention in this regard. He noted that during t988 his previous supervisor, Bill Bennett "...cit[ed] three alleged errors in [his] work during the previous fiscal year.... The frst was the failure to submit a brief in a case before the Board of Contract Appeals (BCA). The second was an alleged failure to spot an issue in a brief before the BCA... The third amounted to the repetition of an unsubstantiated allegation that Complainant's conduct of a BCA hearing, had not been 'not up to minimal professional standards." (IF, Formal Complaint pgs. 1 & 2) In essence, Complainant's own statement indicates there had been significant concerns about Complainant's competency in conducting BCA cases as far back as 1988. Complainant made no mention that he may have challenged Mr. Bennett's perception of his performance for

fiscal year 1988.

Complainant has failed to establish that the agency's reasons were not the true reasons but merely means of masking intentional race, color, age, disability discrimination and/or retaliation. (IF, AFFs., A and Al).

ISSUE NUMBER 2

Was Complainant Discriminated Against Due To His Race, Color, Age, Physical Handicap and/or In Retaliation For His EEO Activity When He Was Allegedly Denied a Training Request On September 21 1995, and Allegedly Provided Few Opportunities For Training and Continuing Legal Education?

The record file indicates that the central focus of Complainant's allegation goes to issue of requests he had allegedly made to take legal courses which were denied to him. Complainant stated on page 2 of his "EEO Request For Counseling" received by the EEO office on May 18, 1994, he had been discriminated against because:[5]

> "All non-minority attorneys w/o requester's age and physical handicaps was treated differently than I when they were provided training & legal education under the Legal Services Strategic Plan. Officials responsible for administering the ACS have provided training and continuing legal education opportunities to such attorneys by paying their tuition to courses necessary to maintain their eligibility to practice law (when such courses have

[5]Complainant did not raise the issue of retaliation in relation to this allegation made on May 18, 1994.

been of '[particular interest]' to the Postal Service). Such officials have provided significantly fewer such opportunities to requester. Requester has also received in office orientation to fewer new areas of law than such attorneys and received the benefit of significantly fewer training dollars than such attorneys."

(See EEO Counselor's Report). Complainant later stated in his formal complaint of discrimination dated November 9, 1994:

> "Prior to the 1988 evaluations, Complainant had been denied even the opportunity to take a free course on 'Fundamentals of (Federal) Agency Civil Practice' because it would have involved travel from San Francisco to Washington, DC... Complainant has subsequently been denied reimbursement for required continuing legal education (ethics and substance abuse training) expenses as little as $70... In January of 1991, while Complainant was still supervising the tort claim unit, he was denied reimbursement for courses on 'Recent Development in Civil Litigation Practice' and 'Recent Developments in Tort Practice,' the tuition for which was $135 each."

Complainant testified that:

> "Other similarly situated employees who have been treated differently include all San Francisco Postal Service general law attorneys who have been approved for training costing as much as or more than $195 tuition, $578 transportation/per diem, or $773 total, from the beginning of 1994~ 1995 fiscal year to date. Other Similarly situated

> employees who have been treated differenUy include all Postal Service attorneys who have been approved for details from the Field into Headquarters since the beginning of 1993-1994 fiscal year... including Bob O'Connell... attorney, San Francisco Office and Robyn Sembenini attorney, San Francisco Office."

(IF, AFF A pg 2) However, Complainant did not explain how it was that these employees were similarly situated. For example he did not state if these alleged unnamed similarly situated employees were attorneys who occupied the same level as he, whether they worked for the same supervisor, or whether the courses approved for them were the same course denied to him, etc.

Complainant also testified:

> "Despite the same advantages over Bob O'Connell, Ms. Godinez-Phillips has never designated me Acting Deputy in her absence, despite having appointed Mr. O'Connell numerous times; nor has she asked me to conduct any client training sessions, despite having asked Mr. O'Connell numerous times."

(IF, AFF. A Pg. 1) In his affidavit dated April 7, 1995, Complainant made a limited statement in regards to this issue when he stated:

> "1 have been...provided fewer opportunities for...continuing legal education...."

Record evidence revealed that the training request which was denied to the Complainant on September 21, 1995, was the Postal Contracting course. Complainant,s supervisor, Doris Godenz-Phillitps, stated she discussed the

matter with her immediate superior M. Perry Johnson and they both agreed that it would be inappropriate for the Postal Service to pay Complainant for taking the course. The reasons relied upon were that the course was too basic in nature for someone with Complainant's experience; Ms Godinez-Phillips added that she was not convinced that Complainant's failure in handling BCA cases wes the result of his lack of knowledge on the subject matter or the organizational structure of the Postal Service. (IF, AFF. B1 pg. 8). Despite Ms. Godlnez-Phillips denial of liis request for traimng, Complainant decided to attend the Postal Contracting course on his own. Ms. Godinez-Phillips stated that although she denied Complainant's request to take the Postal Contracting course, she offered several other alternative courses Complainant could have taken which would have been beneficial to Complainant in the area of contracts. (Ibid). Thereafter, Complainant attempted to get reimbursed for the Postal Contracting course he took. Ms. Godinez-Phillips' superior M. Perry Johnson did agree to allow Complainant to. claim administrative leave for the time taken to attend the course, however, any other costs incurred by Complainant were not approved in that his prior requests for taking the training had been denied. (IF, AFF. B1 PG. 9 & Letter Dated October 31, 1995 in Counselor's Report)-

Regarding his general allegation of continuing violation of being denied training requests since 1987, Ms Godinez-Phillips addresses the ambiguity inherent in Complainant's allegation. She stated:

> "In response to Complainant's question concerning the '...factors [which] determine approval/disapproval of both types of training' I am uncertain as to Complainant's meaning when he refers to 'both types of training.' Notwithstanding

> the above, I will respond under the assumption that Complainant considers developmental assignments and training courses as two recognized separate and distinct forms of training."

(IF, AFF. B1 pg. 11). Ms. Godinez-Phillips explained the procedure followed when a request to attend a continuing educational course and/or detail assignments and under what circumstances would approval be needed from Headquarters. (IF, AFF. B1 pg. 11). She stated that, for example, she would recommend that an attorney's request to go on detail be granted if the work load in the office permits and if she feels that the attorney is qualified to handle the related responsibilities and if she believes that both the individual and the Postal Service will ultimately benefit as a result of the detail. Budget factors were also taken into consideration, she stated. She concluded by stating:

> "I would recommend approval of a continuing legal educational course (training course) if the budget allows it and the requesting attorney's postal performance in his/her area of practice would, in my opinion, be enhanced by his/her attendance at such a course."

(IF, AFF. B1 pgs. 11 & 12). Ms. Godinez-Phillips clarified that:

> "Complainant has been afforded the opportunity to attend training courses. Moreover, he just completed a detail assignment to the Purchasing Department. However, as earlier stated, Complainant has never requested of me a detail to headquarters."

(Ibid). Complainant inferred in his affidavit that he had been treated differently than other similarly situated employees who had been approved for details from the Field to Headquarters. Complainant, however, did not specify to whom he may have made his request, and who was responsible for denying his request(s) for a detail assignment to Headquarters. (IF, AFFs. A and Al).

COMPLAINANT HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF RACE, COLOR, AND AGE DISCRIMINATION.

Complainant failed to meet his burden of identifying similarly situated employees not of his race, color, age, not disabled, and no prior EEO activity who were treated differently. Although Complainant makes an attempt in this regard, he falls short of meeting his burden. Complainant stated that:

> "Other similarly situated employees who have been treated differently include all Postal Service attorneys who have been approved for details from the Field into Headquarters since the beginning of the 1993-1994 fiscal year..."

(IF, AFF., A1 pg. 1). Complainant does not meet his burden with this statement because there is a distinct difference between being denied a request for taking a course in postal contracting and being denied a request to go on a detail assignment. As a result "all Postal Service attorneys who have been approved for details from Field to Headquarters .... " are not employees who similarly situated. Furthermore, "all attorneys" would have to include employees who are and who are not of the Complainant's race, colol younger and older, with/without disabilities, and who had/had not participated in prior EEO

activity Complainant, for example, in his blanket identification of comparative employees which occurs in his affidavit of April 7, 1995, cites his former immediate supervisor, William Campbell, as a comparative employee. Complainant himself identifies Mr. Campbell as an African-American; thus, has the Complainant's race and color. (IF, AFF. A pg. 1).

Complainant named "Bob O'Connell (European-American/white/ [age not applicable]/no disabilities) attorney, San Francisco Office and Robyn Sembenini (Native-American/white/[younger than affiant]/no disabilities]), attorney, San Francisco Office" as comparative employees. (IF, AFF. A1 pgs. I & 2). However, Complainant failed to establish how it was that these comparative employees were similarly situated and how it was they were treated differently. For example, he fails to clarify whether the detail and/or training opportunities provided to the two (2) comparison employees noted above were opportunities he requested and, instead of giving him those opportunities, they were given to the comparison employees noted above. (IF, AFF. Al).

Ms. Godinez-Phillips stated that she was certain that other ACS attorneys outside of Complainant's protected group have had specific requests for training and/or detail assignments denied. (IF, AFF. B1 Pg. 13)

Mr. William Campbell, who became Complainant's supervisor in May 1988 and remained in that capacity until June 1991, also stated that Complainant had never made a request for a detail assignment to him. (IF, AFF., Pg. 16)

Mr. Campbell also stated that the issue of the alleged—training course approved for the Complainant and other employees similarly situated to himself was vague and

ambiguous because Complainant had failed to identify those employees similarly situated to himself. (IF, AFF. F Pg 14)

As a result, Complainant has failed to establish a set of facts which if left unrebutted by the agency would create the inference that race, color, and/or age were factors taken into consideration in regards to his claim that he was allegedly denied a training request on September 21, 1995, and allegedly provided few opportunities for details, training and continuing legal education.

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE OF HANDICAP DISCRIMINATION AS STIPULATED ABOVE IN ISSUE NUMBER 1.

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE OF RETALIATION.

The Complainant has failed to meet one of the elements for establishing a prima facie case of retaliation. Complainant can not establish he was adversely affected by the agency's refusal to approve his request of September 21, 1995, for a training course in that the agency provided him with alternative courses he could have taken which would have been beneficial to his development and Complainant declined. (IF, AFF. B1).

Furthermore, it is apparent from statements submitted by Complainant that the training and detail opportunities which he had allegedly been denied predated his initial contact with an EEO counselor on May 18, 1994. Consequently, Complainant can not establish a nexus between his alleged EEO activity and his claim that he was allegedly denied a training request on September 21, 1995, and allegedly provided few opportunities for details,

training and continuing legal education. (IF, AFFs. A & A!; Formal Complaint Statement)

As a result, Complainant has failed to establish a set of circumstances which if left unrebutted would create the inference that Complainant was discriminated against based on his race, color, disability, age and/or retaliated against based on his prior EEO activity as it relates to Issue Number 2.

COMPLAINANT HAS FAILED TO REBUT THE AGENCY'S ARTICULATED LEGITIMATE NONDISCRIMINATORY REASONS FOR ITS ACTIONS.

Assuming arguendo that Complainant has established a *prima facie* case of race, color, disability, age discrimination and/or retaliation, management would have the obligation of articulating some nondiscriminatory rationale for its actions. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). "Articulation" of a legitimate reason, in this sense, is the mere statement, supported by some evidence, that management had a non-discriminatory basis for its action(s) affecting the Complainant. This will result in a finding of no discrimination unless the reasons given are shown to be mere pretext for discrimination. The final burden is on the Complainant to demonstrate that the reasons given by management for its actions are pretextual. This burden may be met by direct evidence of discriminatory intent or by indirect evidence of past practices.

Management's position is articulated by Ms. Doris Godinez-Phillips who stated that Complainant's request was denied on September 21, 1995, because the course was too basic in nature for someone with Complainant's experience. Ms.

Godinez-Phillips added that she was not convinced that Complainant's failure in handling BCA cases was the result of his lack of knowledge on the subject matter or the organizational structure of the postal Service. (IF, AFF. B1). Ms. Godinez-Phillips also stated that, for example, she would recommend that an attorney's request to go on detail be granted if the work load in the office permits and if she feels that the attorney is qualified to handle the related responsibilities and if she believes that both the individual and the Postal Service will ultimately benefit as a result of the detail. Budget factors were also taken into consideration, she stated and concluded by stating:

"I would recommend approval of a continuing legal educational course (training course) if the budget allows it and the requesting attorney's postal performance in his/her area of practice would in my opinion, be enhanced by his/her attendance at such a course."

With regards to detail assignments, Ms. Godinez-Phillips stated that when a detail assignment is requested by one of her subordinate attorneys, she would forward the request to the Chief Field Counsel at Headquarters along with her recommendation for approval. She added that she would recommend that a detail request be granted if the work load permits, the attorney is qualified to handle the related responsibilities, and both the attorney and the Postal Service will ultimately benefit as a result of the detail. She added that she would recommend approval of a continuing legal educational course (training course) if the budget allowed it and the requesting attorney's postal performance would be enhanced by the attendance." (IF, AFF. B Pgs. 11 & 12)

Ms. Godinez-Phillips added that Complainant had never made a request to her for a detail assignment to

headquarters. She went on to state that Complainant's allegation regarding denial of training courses and details assignments to ACS attorneys outside of his protected group is overly broad in that he has not identified whether he is referencing as his intended area of consideration headquarters, a specific field office, or both, nor has he reference a specific period of time. She concluded by stating that she was certain that other ACS attorneys outside of Complainant's protected group have had specific requests for training and/or detail assignments rejected despite not being aware of the identities of such individuals. (IF, AFF, B Pg. 13)

M. Perry Johnson stated that although no records were maintained which would reflect the number of training courses a particular attorney received, to the best of his recollection Complainant had attended numerous training courses. (IF, AFF. D)

Complainant has not provided any evidence to establish that the agency's reasons were not the true reasons but merely means of masking intentional race, color, age, disability discrimination and/or retaliation. (IF, AFFs., A and Al).

ISSUE NUMBER 3

Was Complainant Discriminated Against Due To His Race, Color, Age, Physical Handicap and/or in Retaliation For His EEO Activity When He Was evaluated under the ACS system causing his salary to decline in comparison to other attorneys?

Complainant stated in his formal complaint statement of November 9, 1994 that during 1988 his previous supervisor, Bill Bennett "...cit[ed] three alleged errors in

[his] work during the previous fiscal year.... The first was the failure to submit a brief in a case before the Board of Contract Appeals (BCA). The second was an alleged failure to spot an issue in a brief before the BCA... The third amounted to the repetition of an unsubstantiated allegation that Complainant's conduct of a BCA hearing had not been 'not up to minimal professional standards." (IF, Formal Complaint pgs. 1 & 2)

Complainant stated that although other attorneys were evaluated on the basis of their future contributions to the agency, he was evaluated on the basis of his past performance. He added that although taking total responsibility, for example, for the operation of the newly formed tort claim adjudication unit and carrying a numerically heavier work load than any other attorney in the office along with devising numerous labor saving innovations to streamline the handling of repetitive casework, as well as software applications to expedite the case-tracking and communication processes, his salary has declined relative to the salaries of other attorneys making him the lowest paid attorney. (ibid)

Complainant stated that the "...pattern of conduct first appeared to Complainant with the December 1988 evaluation." Complainant also noted that "During the year (1988) prior to that evaluation two events occurred which lead (sic) him to believe he has been discriminated against as a member of a protected class: In June of 1987, he turned 40 years of age. In December of 1987, while traveling abroad, he came down with a skin infection requiring hospitalization"[6] (IF, Formal Complaint pg. 4)

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[6]Despite having apparently become aware he had been discriminated against as early as December 1987, Complainant did not indicate that he initiated the EEO complaint process during 1988 or

The record file revealed that on or about December 1987, Complainant requested that his salary adjustment award be reviewed by the Associate General Counsel, William P. Bennett, who denied Complainant's request to change the award which had been based on Complainant's performance for that year. The award in question had been given to Complainant by his immediate supervisor, Bill Campbell. The award was based on Complainant's performance during the prior year. Mr. Bennett informed Complainant, in a letter dated January 6, 1988, that no change would be made because Complainant's "...performance was not up to the potential one would expect of a person possessed of your education and experience. In at least three instances you failed to proceed in an appropriate manner as to the handling of Board of Contract Appeals cases." The three instances were specified in Mr. Bennett's letter of January 6, 1988. (IF, Exh. 4,)

Problems with Complainant's performance also surfaced in a memo dated July 24, 1990, from William Bennett to Bill Campbell (Complainant's immediate supervisor). The memo noted:

> "Bill: Recent review of [Complainant's] standard tort lit. reports reveals that he is giving the wrong cite at the end where he asks that the AUSA confer with him pdor to compromising the case. The cite should read something like that which follows depending on which version of the bluebook you have:...By the way, as far as I know, there is NO 'western district' of cal. as [Complainant] gives cite; he means WD of

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during the years that his salary was allegedly declining in comparison to other attorneys. This and other issues in this complaint may, as a result, have' been presented to the EEO counselor in an untimely manner.

Wash."

(IF, Exh. 6) An example of Complainant's work was provided as Exhibit 7.

Complainant identified the similarly situated employees who were treated differently. He stated:

> "Bill Campbell's youthful good looks and relatively light skin coloring largely account for his success relative to other more experienced minority attorneys like Larry Blanchard /fdcam American/black/[older than Bill Campbell/no disabilities, attorney, Memphis Office) and myself. Like affiant, David Rubin has a degree from an Ivy Law School; he began working for the Postal Service only three months before I did. However, his salary is substantially greater than mine. Maria Fuhrman began working for the Postal Service less than one month after I did. She did not graduate from an Ivy League law school. Her salary is substantially greater than mine. In terms of salary, there are no similarly situated Postal Service attorneys not sharing my race, color, age and disabilities who are paid as little as I .... "

<u>.COMPLAINANT HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF RACE, COLOR, AND AGE DISCRIMINATION.</u>

This is based on the fact that Complainant's allegations are overly vague and, Complainant has failed to identify similarly situated employees not of his race, color and/or age who were treated differently. Granted the Complainant made the claim that he was the lowest paid attorney, however, he has provided no evidence that other attorneys,

similarly situated and not of his race, color, and/or younger than he were treated more favorably. Nor has Complainant established that other attorneys of his race, color and/or age and similarly situated, were also disadvantaged by the ACS evaluations. Complainant did attempt to identify similarly situated employees not of his race, color and/or age who were treated differently, however, Complainant did not meet his burden in this regard. For example he named David Rubin (European American/White) and Maria Fuhrman (European American/White) whom Complainant claims were similarly situated because, like Complainant, had a degrees from Ivy League Law schools and began employment about the same time as Complainant. However, there is no evidence in the file that having been a graduate from an Ivy League school was a criteria used in evaluating attorneys under the ACS program. Complainant also did not indicate if the same supervisor/ manager evaluated Mr. Rubin and/or Ms. Fuhrman during the years in question nor did Complainant go on to explain how his performance was on a par with that of Mr. Rubin and Ms. Fuhrman. Complainant also named Doris Godinez-Phillips (Hispanic/White, age-48) and Bob O'Connell (European American/White) as similarly situated employees who were treated differently, yet he doesn't go on to explain how they were similady situated and specifically how they were treated differently. Complainant also attempted to identify William Campbell (his former supervisor prior to Ms. Godinez-Phillips) as a similarly situated employee who was treated differently because he had been more successful. Complainant attributed this success on Mr. Campbell's perceived youthful good looks and light skin coloring (Mr. Campbell is an African-American). However, Complainant fails to specify how he was similarly situated to Mr. Campbell and specifically how he was treated differently. For instance, Complainant failed to cite an example where Mr. Campbell's lighter skin color enabled him to be treated

more favorably than the Complainant under similar circumstances. (IF, ' AFF., A & Al; Formal Complaint Statement).

It should also be noted that the primary responsible official in this issue Ms. Godinez-Phillips stated that since her the beginning of her tenure as Complainant's supervisor, which began in 1991, she had no direct involvement in appraising the performances of David Rubin or Maria Fuhrman. (IF, AFF. G)

Complainant has, particularly in this issue, attempted to establish an inference of discrimination by making general allegations of disparate treatment which have not been supported by any attempt of clarifying the ambiguities and generalizations inherent in Complainant's allegations. As a result, Complainant has failed to establish a set of facts which if left unrebutted would give the inference that he was evaluated based on his race, color, and/or age (handicap and/or retaliation) resulting in being the lowest paid attorney.

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE .OF HANDICAP DISCRIMINATION AS STIPULATED ABOVE IN ISSUE NUMBER 1.

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE OF RETALIATION.

The Complainant has failed to meet one of the elements for establishing a prima facie case of retaliation. Complainant can not establish that during the years beginning in 1988 and ieading up to May 1994, the alleged responsible officials were aware of his prior EEO activity. Also, as noted above, Complainant has failed to establish he was treated differently than other similarly situated employees

who had not participated in prior EEO activity. As a result, Complainant can not establish a nexus between his alleged EEO activity and the evaluations he may have received under the ACS system which allegedly caused him to be one of the lowest paid attorneys. (IF, AFF., A & Al; Formal Complaint Statement).

COMPLAINANT HAS FAILED TO REBUT THE AGENCY'S ARTICULATED LEGITIMATE NONDISCRIMINATORY REASONS FOR ITS ACTIONS.

Assuming arguendo that Complainant has established a *prima facie* case of race, color, disability, age discrimination and/or retaliation, management would have the obligation of articulating some non-discriminatory rationale for its actions. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). "Articulation" of a legitimate reason, in this sense, is the mere statement, supported by some evidence, that management had a non-discriminatory basis for its action(s) affecting the Complainant. This will result in a finding of no discrimination unless the reasons given are shown to be mere pretext for discrimination. The final burdare is on the Complainant to demonstrate that the reasons given by management for its actions are pretextual. This burden may be met by direct evidence of discriminatory intent or by indirect evidence of past practices.

Management's position is articulated by Ms. Doris Godinez-Phillips who stated that Complainant had been disadvantaged during the appraisal process because of his inability to perform certain types of work such as functions which required litigation skills. He was also not assigned specific legal matters, she added, because of Complainant's exhibited lack of judgment in handling such maters as was

the case with BCA appeals or similar types of work. She noted that this was a practice which had preceded her incumbency in her role as Complainant's immediate supervisor; she just continued the practice until Complainant could demonstrate he could handle such casework. She added she had been made aware that one BCA judge had commented something to the effect that Complainant's performance at a hearing was the worst he had ever seen. (IF, AFF. B pg. 16)

Mr. William Campbell, who became Complainant's supervisor in May 1988 and remained in that capacity until June 1991, stated he had been responsible for drafting Complainant's 1988 Performance Evaluation for which Complainant received a 1% salary adjustment. This recommended salary adjustment was lower than that recommended for the other staff attorneys under Mr. Campbell's direction. Mr. Campbell stated that he made the recommendation since Complainant's performance had not been on par with the other staff attorneys under his direction. Mr. Campbell added that he had informed Complainant of his performance deficiency on two occasions. (IF, AFF. F Pg. 13)

Complainant attempted to rebut the agency's legitimate nondiscriminatory reasons by arguing that the absence of any attempt to review the unsubstantiated allegation with him prior to relying on them for his evaluation demonstrated that he was not evaluated with objective deliberation. The pattern, he stated, of relying on unsubstantiated allegations has been continuous since 1988. Complainant noted that he was evaluated in terms of his past performance, others not of his protected group were evaluated in terms of their future value to the Postal Service. (IF, Formal Complaint Statement)

Complainant, however, was overly vague in attempting to rebut the agency's legitimate nondiscriminatory reasons and therefore failed to meet his burden. For example, his statement covers a period of many years yet he provides no specific instances, for example, of specifically when he was evaluated without objective deliberation and by what immediate supervisor. Furthermore, there is no evidence in the file that prior to May 1994 Complainant had challenged the agency's performance evaluations of him. Although Complainant had noted on occasion that the agency had not recognized his administrative contributions as they applied to his knowledge and assistance with the computer systems in the office, the agency had responded that Complainant had been hired to work as an attorney and not as a computer systems analyst. (IF, AFFs, A & Al, B pg. 20 & C)

Complainant has failed to establish that the agency's reasons were not the true reasons but merely means of masking intentional race, color, age, disability discrimination and/or retaliation. (IF, AFFs., A and Al)

ISSUE NUMBER 4

Was Complainant Discriminated Against Due To His Race, Color, Age, Physical Handicap and/or in Retaliation For His EEO Activity When He Was Allegedly Not Given Appropriate Recognition For Innovation And Application of Computer Technology in The November 1995 Issue of PASSWORD?

In regards to this issue Complainant stated in his affidavit of January 15, 1996:

> "I further believe that my not being given appropriate recognition for innovations and applications of

computer technology are consistent with the continuing pattern and practice...of ignoring those things for which I could be recognized positively." (IF, AFF. A).[7]

COMPLAINANT HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF RACE, COLOR, AND AGE DISCRIMINATION.

Complainant has failed to meet this burden in that he has failed to identify similarly situated employees not of his race, color and/or age who were treated differently. Furthermore he has failed to establish how he was harmed when he was not recognized in the newsletter PASSWORD. Complainant also did not name the alleged management responsible official who allegedly treated him differently than other similarly situated employees not in his protected group(s). (IF, AFFs. A & Al)

As a result, Complainant has failed to establish a set of facts which if left unrebutted would give the inference that he was not given recognition in the November 1995 newsletter Password for his innovations and applications based on his race, color, and/or age (handicap and/or retaliation).

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE OF HANDICAP DISCRIMINATION AS STIPULATED ABOVE IN ISSUE NUMBER 1.

COMPLAINANT HAS ALSO FAILED TO ESTABLISH A PRIMA FACIE CASE OF RETALIATION.

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[7]It should be noted that when the EEO Investigator requested that Complainant submit a statement and to address this issue, this statement is all Complainant submitted. Complainant did not go into detail of how it was he was discriminated against in this regard.

The Complainant has failed to meet one of the elements for establishing a prima facie case of retaliation. Complainant has not established that the alleged responsible officials were aware of his prior EEO activity. Also, as noted above, Complainant has failed to establish he was treated differently than other similarly situated employees who had not participated in prior EEO activity. As a result, Complainant can not establish a nexus between his alleged EEO activity and his not being given appropdate recognition for innovations and applications of computer technology in the November 1995 issue of PASSWORD. (IF, AFF., A & Al; Formal Complaint Statement).

COMPLAINANT HAS FAILED TO REBUT THE AGENCY'S ARTICULATED LEGITIMATE NONDISCRIMINATORY REASONS FOR ITS ACTIONS.

Assuming arguendo that Complainant has established a *prima facie* case of race, color, disability, age discrimination and/or retaliation, management would have the obligation of articulating some nondiscriminatory rationale for its actions. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). "Articulation" of a legitimate reason, in this sense, is the mere statement, supported by some evidence, that management had a non-discriminatory basis for its action(s) affecting the Complainant. This will result in a finding of no discrimination unless the reasons given are shown to be mere pretext for discrimination. The final burden is on the Complainant to demonstrate that the reasons given by management for its actions are pretextual. This burden may be met by direct evidence of discriminatory intent or by indirect evidence of past practices.

Management's position is articulated by Ms. Doris Godinez-Phillips who stated that she had nothing to do with the issuance of the newsletter "Password" which, to the best of her knowledge, was created and distributed by User Support, a contractor which supplied computer assistance to the Law Department. (IF, AFF., B pg. 20) She added that although she recognized Complainant's voluntary computer work, Complainant was hired as an attorney and not a computer analyst and he was therefore evaluated and rated primarily based on his work as an attorney. (IF, AFF., B pg. 20)

Complainant has failed to establish that the agency's reasons were not the true reasons but merely means of masking intentional race, color, age, disability discrimination and/or retaliation. (IF, AFFs., A1 and A2)

CONCLUSION

Case H0-0035-95 is now closed on the present record with a finding of no race, color, age, disability discrimination and/or reprisal for prior EEO activity.

RIGHT TO FILE A CIVIL ACTION

If you are dissatisfied with the Postal Service's final decision in this case, you may file a civil action in an appropriate U.S. District Court, within 90 calendar days of your receipt of the Postal Service's final agency decision. If you choose to file a civil action, that action should be captioned Charles T. Jackson v. Marvin Runyon, Postmaster General. You may also request the court to appoint an attorney for you and to authorize the commencement of that action without the payment of fees, costs, or security in such circumstances as the court deems just. Your application must be filed within the same 90-day time period for filing the civil action.

your receipt of the Office of Federal Operations' decision. A civil action may also be filed after 180 calendar days of your appeal to the *EEOC*, if you have not received a final agency decision on your appeal.

10-6-97
Date

S/_____
Peter L. Garwood
Manager
Equal Employment Opportunity
Compliance and Appeals

EEO Complaint of Discrimination in the Postal Service
(PS Form 2565, September1992)

1. Name:
Charles Thomas Jackson

2. SSN:
280-42-8741
Case No.:
HO-0035-95

3. Mailing Address:
1107 Mission Road, #109
South San Francisco, CA 94080

4. Home Phone:
(415) 875-4119

5. Work Phone:
(415) 548-2000

6. Position Title *(USPS Employees Only):*
Attorney

7. Grade Level *(USPS Employees Only):*(Attorney Compensation System [ACS])

8. Installation Where You Believe Discrimination Occurred *(Include Division/MSC Name, City, State, and ZIP+4):*
Law Department/Ofc. of Field Legal Services
San Bruno 94099/Burlingame 94010

9. Name and Title of Person(s) Who Took the Action(s) You Allege Was Discriminatory:
All officials responsible for administering ACS including but not limited to Assoc. Gen. Counsel Bill Bennett; Chief Field

Counsel Perry Johnson (contin):

Deputy Chief Field Counsel Doris Godinez-Phillips, General Counsel Mary Elcano, and Deputy General Counsel Charles Kappler.

10. I designate this person to be my representative. a. Name, Title & Mailing Address b. Home Phone c. Work Phone:
[no entry] Agency file stamp inserted:
"[uninyelligible] NOV 16 1994
Received"

11. Type of Discrimination Alleged:
[x[Race (Specify): African-American
[x] Color (Specify): Black
[ ] Religion (Specify):
[ ] National Origin (Specify):
[ ] Sex (Specify):
[x] Age (Specify): over 40
[ ] Retaliation (Specify Prior EEO Activity):
[x] Handicap (Specify): Atopic dermatitis, glaucoma, cataracts & vocal abnormality

12. Date on Which Alleged Act of Discrimination Took Place:
October, 1987, and continuously thereafter

13. Explain the specific actions or situation that resulted in your allegation(s) as to how you believe you were discriminated against (treated differently from other employees or applicants) because of race, color, religion, national origin, sex, age or handicap:
See Continuation Sheet attached. [text of which follows}:

Complainant is a black African-American born in June of 1947. He has a combination of physical handicaps,

including atopic dermatitis causing discoloration of his skin, a vocal cord abnormality restricting the range of his voice, and until July of 1994, glaucoma and cataracts.

Since October of 1987, officials responsible for administering the Attorney Compensation Syatem (ACS) have been doing so in such a manner as to discriminate improperly against complainant on the basis of his race, color, age and physical handicaps.

In October 1987 the Law Department issued a policy statement describing a new Attorney Compensation System the fundamental focus of which was to be on each attorney's expected value to the Postal Service for the coming fiscal year (Attachment A). Performance appraisals under this new system were to be reviewed with individual attorneys by their immediate managers prior to being acted upon. All salary adjustments were to be based on a documented appraisal of performance based on factors identified on an "Appraisal of Performance form." Performance awards were to be geared to the value of exceptional ("extra") performance, and to the level of performance expected of other attorneys of similar ability. By and large Law Department salary administrators have followed this policy in their appraisal of attorneys not sharing complainant's race, color and physical condition.

At the foundation of the ACS is the process of evaluation. Evaluation connotes, if not denotes, objective deliberation. The administrators will admit that they have employed objective deliberation in their evaluation of all attorneys not sharing complainant's race, color and physical condition. They have demonstrably failed to employ such objective deliberation in their evaluation of complainant's performance.

In December of 1988, complainant received a 1% salary adjustment and a 1% performance award despite a generally positive Appraisal of Performance recognizing complainant's extra performance in the general area of office administration. Upon receiving notice of this decision complainant requested review of the performance rating implicit in the amount of the salary adjustment (Attachment B).

Bill Bennett responded by citing three alleged errors in complainant's work during the previous fiscal year (Attachment C). The first was the failure to submit a brief in a case before the Board of Contract Appeals (BCA). Complainant recognizes this omission as error but disputes the implication that the parties had been ordered by the Board to submit such briefs.

The second was an alleged failure to spot an issue in a brief before the BCA. In point of fact complainant had addressed that issue in the first draft of his brief (Attachment D), but had been required to remove that reference from the brief by then acting Regional Counsel Donna Eisen. This alleged error had been neither documented nor reviewed with complainant by any of his supervisors.

The third amounted to the repetition of an unsubstantiated allegation that complainant's conduct of a BCA hearing had been "not up to minimal professional standards." In point of fact that case was decided in favor of complainant's client, the Postal Service (Attachment E), and no one had theretofore even suggested to complainant that his conduct of that hearing had not been up to minimal professional standards. The record alone in that case was decisively favorable to the Postal Service. Because the contractor had suggested improper motivation on the part of the Contracting Officer, complainant did exercise some

forbearance, not wanting to appear to the contractor to have won on the basis of a "technicality." The contractor's counsel in that case, attorney R. Stanley Ditus of Anchorage, AK, understood complainant's approach if Judge Finn - Bill Bennett's informant - did not.

Bill Bennett further stated his understanding that complainant had been removed from all BCA cases. In point of fact his workload had only recently been readjusted to allow for more exposure to BCA work (Attachment B). The truth is that complainant had been removed from no cases but rather, under pressure from Bennett, assigned only to those BCA cases to be submitted on the record without hearing.

The absence of any attempt to review his allegations with complainant prior to relying on them for his evaluation demonstrates that Bill Bennett was not evaluating complainant with the objective deliberation he employed - and was required by the ACS policy to employ - in his evaluation of other attorneys. Rather he took the approach of an advocate attempting to prove a point: in this case complainant's relative worthlessness to the Postal Service. This pattern of relying on unsubstantiated allegations and "understandings" to prove a point has characterized the administrators' evaluation of complainant from December 1988, at the latest, up to the present.

While attorneys not sharing complainant's race, color and physical condition have been evaluated on the basis of activities documented on the evaluation form, complainant has been evaluated on the basis of unsubstantiated allegations never alluded to on the evaluation form.

While attorneys not sharing complainant's race, color and physical condition have been evaluated prospectively, in

terms of their future, on the basis of their value to the Postal Service in the next fiscal year, complainant has been evaluated retrospectively, in terms of his past, on the basis of prior errors, differences of opinion and other allegations questioning his value. Although the value of any commodity is measured in terms of its utility and its scarcity, both the utility and scarcity of complainant's skills have been ignored. The intellectual property value of complainant's WordPerfect MEMO macro alone (Attachment F) should have brought his salary at least to the office average by now. The scarcity of computer skills is apparent in the fact that the San Francisco office is still trying to reinvent the remote-file-transfer system complainant has been using and making available to other attorneys since 1992 (Attachment G). The July 20 computer disaster (Attachment H) could only have caused the panic it did in complainant's absence (following eye surgery on July 19).

While attorneys not sharing complainant's race, color and physical condition have been treated as if motivated by the prospect of reward, complainant has been treated as if motivated only by fear of punishment. Although all the attorneys are expected to protect the best interests of the Postal Service, only complainant has been treated in such a way as to undermine his loyalty to the Postal Service.

Beginning in 1989, complainant took on total responsibility for the operation of the newly-formed tort claim adjudication unit, including the responsibility of writing the job descriptions for, and supervising the activities of, a paralegal and a claims specialist, as well as the responsibility of responding to all tort litigation filed against the Postal Service in the Western Region. During these intervening years complainant has carried a litigation caseload numerically heavier than that of any other attorney in the office, as well as an advice caseload heavier than that of

any other attorney in the office (Attachments I, J, K and L). During these years complainant has devised numerous labor-saving innovations to streamline the handling of repetitive casework, as well as software applications to expedite the casetracking and communication processes. Still complainant's salary has declined relative to the salaries of other attorneys: His extra work and innovations have been ignored by the salary administrators, as each year he receives below-average salary increases despite relatively favorable evaluations. Complainant has now become the lowest-paid attorney in the office: the beneficiary of the lowest salary increases and the least recognition, as well as the fewest training dollars and travel opportunities.

Prior to the 1988 evaluations, complainant had been denied even the opportunity to take a free course on "Fundamentals of (Federal) Agency Civil Practive" because it would have involved travel from San Francisco to Washington, DC (Attachment B). Complainant has subsequently been denied reimbursement for required continuing legal education (ethics and substance abuse training) expenses as little as $70 (Attachment M). In January of 1991, while complainant was still supervising the tort claim unit, he was denied reimbursement for courses on "Recent Developments in Civil Litigation Practice" and "Recent Developments in Tort Practice," the tuition for which was $135 each. In November of 1993, Mr. Johnson and Ms. Godinez-Phillips ignored even an unanimous recommendation by his co-workers for an award in recognition of complainant's computer innovations (Attachment N): When awards were distributed at the subsequent annual meeting, four went to his co-workers (two of whom had been relying on databases and spreadsheets designed by complainant), but not one went to complainant.

While complainant's value has been ignored, no peccadillo has gone unnoticed. As he struggled to stay abreast of [50+] open tort cases, Bill Bennett was sending sarcastic E-mail to his supervisor deriding him for typographical and citation errors (Attachment O). During the spring of 1992, when a surfeit of boxholder infomation inquiries required complainant to take substantial amounts of work home, the only reaction of Ms. Godinez-Phillips was that he was now coming in too late. Likewise, after he had developed the WordPerfect Works databases (at home) and brought the software in for demonstration, the only reaction of Ms. Godinez-Phillips was that it was unethical for him to install it on the office computer before we had bought the software.

This continuing pattern of ignoring complainant's value while emphasizing only the negative demonstrates the absence of any attempt on the part of the salary administrators to evaluate complainant's skills with objective deliberation. They have, in effect, committed themselves to his failure. No other attorney has been subjected to such unflagging contempt and humiliation.

This pattern of conduct first appeared to complainant with the December 1988 evaluation. During the year prior to that evaluation two events occurred which lead him to believe he has been discriminated against as a member of a protected class: In June of 1987, he turned 40 years of age. In December of 1987, while travelling abroad, he came down with a skin infection requiring hospitalization. Prior to that time he had worn make-up to ameliorate the effect of the atopic dermatitis he had had since the age of 14. Following hospitalization he stopped wearing make-up, rendering obvious the full extent of skin discoloration brought on by his disease. Although most of his co-

workers, including Ms. Godinez-Phillips (then Ms. Godinez-Taylor and not yet in PCES status), expressed concern for his health, she did exhibit what he took to be an involuntary reaction, in that for some time she avoided speaking to him and had some apparent difficulty making eye contact. Her social distance appears to complainant to have only increased since that time.

Although the administrators' evaluations of complainant have remained generally positive since that time, their attitude toward complainant has taken on a disproportionately adversarial emphasis on disproving the value of his work, relying heavily on undisclosed assumptions and unsubstantiated ex parte input to that end. Among the undisclosed assumptions appears to be the belief that, despite his admission to and graduation from Harvard College and Harvard Law School, he is unable to adapt to the demands of BCA practice and real estate work. Such an assumption could result from the belief that complainant owes the quality of his education more to affirmative action than to his own talents. Their apparent perception of complainant as stupid in legal matters is inconsistent with their begrudging recognition that he is among the most talented attorneys in the office on computer matters; both require the same imagination and facility with abstract thought. Complainant believes the attitudes of the salary administrators toward him - their inability to see him in perspective - have been colored by their perception of him as too black to be respected, too old to be taught, too sick to warrant efforts at cure, and too ugly to be shown to the public.

Complainant discussed these issues with Postal Service General Counsel Mary Elcano when she visited the San Bruno Office in February of 1994, and asked her to review the situation (Attachment P). Deputy General Counsel

Charles F. Kappler responded on April 19, 1994, by suggesting that complainant discuss the matter with his supervisor, Doris Godinez-Phillips. He discussed the matter with Ms. Godinez-Phillips on May 5, 1994. She advised him that his pay had been commensurate with his performance and that no relief could be expected. On May 18, 1994, complainant filed his Request for Counseling. The contents of his Request for Counseling are incorporated by reference herein as a part of this Complaint.

On October 27, 1994, by referral of Pacific Area Medical Officer Dr Ibrahim Farid, complainant took an IQ test administered by industrial psychiatrist Robert Larsen in his office at 690 Market Street, Suite 706, San Francisco. Dr Larsen interpreted complainant's score, 1 error out of 60 questions, as suggesting an IQ in the range of 120-plus. Dr. Larsen also noted ironically that, if complainant had achieved a perfect score, "genius" in effect, it might have been suspected that he had cheated. This expectation of African-American mediocrity is too salient in American society at large to be ignored in this context as a possible explanation of the salary administrators' conduct. To Dr. Larsen, complainant may be credible as a borderline genius, but not as a genius. The salary administrators cannot see the genius at all, only the borderline.

My theory is this: The salary administrators have not expected to see the 59 successes, so they haven't noticed them. That one error is what they expect to see, so when they see it they point it out as justification for their expectations. If complainant's performance is flawless, he is seen as the Will Smith character in Six Degrees of Separation, an imposter performing by rote. If he makes that one error, his performance is flawed and he has to be taught a lesson. They can't reward a flawed performance.

This is not the way other attorneys are treated. Must they be reminded that the appearance of stupidity has had survival value to African-Americans for centuries? Blacks who have appeared too intelligent to white people have occasionally (if not routinely) been sanctioned with extreme prejudice before they could reproduce. This is history. It may be that complainant is unable to seem as capable to the salary administrators as he actually is.

The inexorable human tendency to react negatively to ugliness is a matter of psychological fact. That such tendency has had no effect on the decisions of the salary administrators is inconceivable.

Agency file stamp inserted:
"EEO COMPLIANCE & APPEALS
94 NOV 14 PM 5:11"

14. I have discussed my complaint with an EEO counselor:
[x] Yes (date of final interview: 10-2-94 by mail)
Rcvd. 10/27/94 S/Chas T. Jackson
[ ] No

15. Name and Signature of EEO Counselor:
S/Glenn F. Kramer, J.D.

16. Corrective Action Sought:
Raise in pay, retroactive to October 1987, to the amount(s) complainant would have been paid in the absence of improper discrimination.

17. Signature of Complainant
S/Charles T. Jackson

18. Date of This Complaint:
November 9. 1994

Letterhead:
Law Department, San Francisco Office
United States Postal Service
577 Airport Blvd., Suite 200
Burlingame, CA 94010-2040
415-548-2000
FAX 415-548-1320

November 6, 1996

Memorandum to:
M. PERRY JOHNSON
MANAGING COUNSEL

SUBJECT:
CHARLES JACKSON'S EVALUATION
FY-95-96

Pursuant to your request, I reviewed my files and I found a number of incidents in the fiscal year in question where Charles Jackson exercised either poor judgment or evidenced a lack of common sense. Examples:

1. 9/96. Charles sought and obtained a developmental detail to the San Bruno Purchasing Service Center as a purchasing specialist. Mr. Jackson's detail was predicated on the fact that under no circumstances was he to act as a legal advisor to Purchasing during his detail. Yet, as part of his accomplishments for the year he stated that he had worked "... as a purchasing specialist and legal resource..." Such statement prompted a response of serious concern from the Manager of the San Bruno PSO. See letter from Ann Mueller dated October 4, 1996.

2. 9/96. Unauthorized use of LDCATS System. In

order to prepare his objectives and accomplishments for the fiscal year, Charles obtained and painstakingly reviewed our system to determine the number of matters or cases each attorney in this office had handled during the fiscal year. Presumably, to show how his workload compared with others in the office. In my opinion, such use of the system is of no benefit to the office for a number of reasons. First, the inordinate amount of time Charles spent in such exercise could have been used to respond and review client work th:at was directly assigned to him. Second, numbers alone mean very little without taking into account the difficulty of a case or a particular matter. And third, at least one of the attorneys in the office was disturbed that Charles was able to scrutinize everyone's work to draw conclusion's about the work of his colleagues.

3. 9/96. Charles wrote a letter to the San Diego District Manager on "Leafletting on Postal Property" where he stated that "this office" authorized--under certain circumstances described in a letter he and an organization's representative signed--informational leafletting on postal premises. Charles' team leader was disturbed on two grounds: a) incorrect legal advice and b) Charles' take over another team's work assignments. He stated that he had mentioned similar instances to you and that he could not properly function as a team leader unless he knew the matters that all attorneys in his team were working on. In your absence, I discussed the matter with Charles who responded, as he has in the past, about "differences of opinion on how best to handle matters and that it was a matter of semantics."

4. 11/95. Assignment of a renewal option. Charles in the past had requested assignments in real estate. I assigned to him a rush project that we received from Dave Klement from Asset Management. He told me that he was

too busy to do it. I responded that everyone else was also busy and that this was the type of "challenging" assignment he had requested in the past. In the end, I assigned the project to myself because of urgency expressed by the client.

5. 9/95. Administrative Claim of George Chacon. Charles negotiated with opposing counsel a settlement in excess of his authority and requested authorization from Claims at Headquarters. The request was denied and Bill Gilligan expressed concern on the way Charles handled the matter.

6. 9/95. Mishandling of the Bollschweiler Appeal. You are familiar with the facts of this case. In summary, Elena assigned Charles a BCA case in my absence. She told him to work with her on the case. He proceeded to handle the matter without guidance, made several blunders, refused to follow our instructions, and "withdrew" from the case.

7. 9/95. During OD service Charles received a calt from the manager of the Denver DNO who was concerned because of violence threats uttered by a contractor. He wanted to deny the contractor access to the facility. He read the threatening remarks to Charles and Charles advised that he felt the contractor "merely" lost his temper and advised to send an "Adequate Assurance Notice" instead. This notice is used to warn contractors of contract irregularities. Some of the contractor's remarks were: "I'll take or shoot 9 before I go to jail." The client disregarded the advice and felt that Charles had not used good judgment. See letter of September 27, 1995 and supporting documentation.

8. 8/95. Settlement of $500.00 in cash by Nevada

District in a matter of lost mail. The matter created considerable disturbance at headquarters because of the poor precedent it set and the incorrect legal "underpinning" for the settlement. In my discussion with Charles, he stated that he found "a way to come up" with a solution that would do "equity." The payment would not be for "lost mail" but to "purchase the Postal Service's reputation" to compensate a long-standing customer for the loss and good "public relations." We again engaged on a discussions of "equitable" considerations, and among many other things, I stated that neither him nor I had the authority to enact postal policy and he stated tha' the people who do are "dogmatic" and that at the very least he had forced people to think and "jump out of the box."

9. 8/95. Suggestion for written guidelines to compensate "equitable claims." Headquarters attorneys concluded the idea may create "the exact type of problems which the proposal [sought] to avoid. See correspondence dated 8/16 from Jeff Zelkowitz. In addition, Charles provided the advice to a Salt Lake City Office client in the Western Area without notifying Hal or any of his attorneys.

10. 5/95. Charles negotiated a settlement in a claim. There was a misunderstanding and after the check had been negotiated by opposing counsel Charles was asked to re-open the case. He wrote to Bill Gilligan requesting approval and copied opposing counsel. Bill rejected Charles' recommendation and was extremely disturbed because Charles had sent a copy of an internal memorandum to plaintiff. I discussed the matter with Charles who agreed that "perhaps it was not a good idea to share internal communications with opposing counsel" but he wanted to "create goodwill."

11. 4/95. Bothel, WA Union Grievance. You are aware

of the facts of this situation. In summary, Charles proposed a "neutral zone" in employee breakrooms that would not be considered postal premises for the purposes of "passive-solicitations." The advice was in direct conflict with postal laws and regulation and caused a number of problems with the union and our clients.

12. Although not technically part of FY-95, there were a number of incidents while you were on vacation that continue to demonstrate Charles' poor judgement. For instance, on October 1, 1996, he was OD and left early without notifying me or making any provisions for the handling of his calls. He continued to call in the morning to notify the staff that he either was taking annual leave or "had not slept well" and would take care of the paperwork the following day. Charles also sent out an answer in a labor case without review by John Oldenburg who had instructed to coordinate the matter with him. One of the attorneys on his team complained that Charles did not return a call during O.D. duty and he had to handle the matter.

The above examples are only some of the incidents I documented during the past year. Needless to say, due to time constraints, it is impossible to document every incident where in my opinion the judgment exercised by Charles is not of the caliber to be expected of the attorneys in this office.

s/ Doris Godinez-Phillips
Deputy Managing Counsel